The Nature of Law and Legality in the Byzantine Canonical Collections 381-883

David Ferguson Wagschal

The present work seeks to explore the nature of law and legality in the Byzantine canonical tradition through a careful reading of the central texts of the Byzantine canonical corpus. The principal topics to be considered include the shape and growth of the corpus as a whole, the content and themes of the traditional prologues, the language, genre and style of the canons themselves, and the traditional thematic rearrangements of the canonical corpus.

As a cultural-historical exploration of law, this work has as its goal throughout to trace the fundamental contours of how the tradition conceives, frames and "imagines" itself as a legal system: central themes and concepts, basic presuppositions, recurring patterns, and prominent contextualizations. Drawing on categories of modern legal theory and legal anthropology, this work is particularly interested in the nature of legal norms and their relationship to other normative systems, the place and role of technical rule-discourse, and mechanisms of change, development and interpretation. The relationship of the canons to the secular law will also be taken into account.

The central argument of this work is that the picture of law that emerges from the Byzantine material is fundamentally at odds with many formalist/positivist expectations of modern western legal culture. This dissonance had traditionally made it very easy to dismiss Byzantine canon law as "primitive" or "decadent". If approached more sympathetically, however, this strange legal world can be read as constituting a surprisingly coherent and rich legal system that is characterized by 1) a deep investment in embedding itself in broader value-narratives; 2) the centrality of the idea of law as a sacred (and relatively inviolable) tradition; and 3) a strong orientation towards the realization of substantive justice, not formal consistency. If taken seriously, this picture of law has a number of important implications for contemporary Orthodox canonical legal theory, the broader history of church law, and the study of late antique and Byzantine law generally.

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Volume One of Two

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Submitted for the Degree of Doctor of Philosophy
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2010

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VOLUME I

ABBREVIATIONS, CITATION STYLES, EDITIONS, AND LEXICA

For reasons of economy, **canonical sources** are cited throughout this work by one or two-word identifiers followed by canon number in Arabic numerals: e.g. "Trullo 23" = canon 23 of the council in Trullo; "Apostles 48" = canon 48 of the canons of the Apostles; "Dionysius 4" = canon 4 of Dionysius of Alexandria's canons.

The identifiers are as follows:

"Amphilochius" = Amphilochius of Iconium (d. 394/403)
"Ancyra" = council of Ancyra (314)
"Antioch" = council in Antioch (traditionally dated 341; now thought to be c.330)
"Apostles" = canons of the Apostles (compiled c.380, perhaps in Antioch)
"Athanasius" = Athanasius of Alexandria (d. 373)
"Basil" = Basil of Caesarea (d. 379)
"Carthage" = the so-called *materies Africana*, a compilation of 4th and 5th C African material presented in the tradition as the council in Carthage 419
"Chalcedon" = council of Chalcedon (451)
"Constantinople 394" = council in Constantinople (394)
"Constantinople" = council of Constantinople (381; with later supplements as per the canonical collections)
"Cyprian" = council of Carthage (251; extracts from council presided over by Cyprian)
"Cyril" = Cyril of Alexandria (d. 444)
"Dionysius" = Dionysius of Alexandria (d. 264/5)
"Ephesus" = council of Ephesus (431; with later supplements as per the canonical collections)
"Gangra" = council of Gangra (340-342?)
"Gennadius" = Gennadius of Constantinople (d. 471)
"Gregory Naz." = Gregory of Nazianzus (d. 390)
"Gregory Nyss." = Gregory of Nyssa (d. 395?)
"Gregory Thaum." = Gregory Thaumaturgus (210-270?)
"Hagia Sophia" = council in Constantinople (879)
"Neocaesarea" = council of Neocaesarea (315/319)
"Nicaea" = council of Nicaea (325)
"Peter" = Peter of Alexandria (d. 311)
"Protodeutera" = council in Constantinople (861)
"Serdica" = council in Serdica (342)
"Tarasius" = Tarasius of Constantinople (d. 806)
"Theophilus" = Theophilus of Alexandria (d. 412)
"Timothy" = Timothy of Alexandria (d. 385)
"Trullo" = council under Justinian II "in Trullo", i.e. the Quinisext or Πενθέκτη (691/2)
"II Nicaea" = council of Nicaea (787)

Principal editions, translations or repertoria:

ACO = E. Schwartz (ed.) *Acta conciliorum oecumenicorum 431-879*, 4 tomes in 14 vols. Berlin 1914-1974
Clavis = M. Geerard, *Clavis Patrum Graecorum*, 5 vols. with suppl. Brepols 1974
Fonti = P.-P. Joannou (ed.) *Discipline générale antique (IVe-IXe s.),* Pontificia Commissione per la redazione del Codice di diritto canonico oriantal – Fonti, fascicolo IX, 4 vols. Grottaferrata 1962-1964

Kormchaya = V. Beneshevich (ed.) Древне-славянская Кормчая. XIV титулов без толкований, St. Peterburg 1906

Mansi = J.D. Mansi (ed.) *Sacrorum conciliorum nova et amplissima collectio,* Florence-Venice 1759-1798

NPNF = H. Percival, (trans.) *The Seven Ecumenical Councils*, Nicene and Post-Nicene Fathers, 2nd ser., vol. 14. Oxford 1900

Pitra = J.B. Pitra (ed) *Iuris Ecclesiastici Graecorum Historia et Monumenta*, 2 vols. Rome 1864, 1868.

PG = J.P. Migne (ed.) *Patrologia cursus completus. Series graeca*, Paris 1857-1866

PL = J.P. Migne (ed.) *Patrologia cursus completus. Series latina,* Paris 1840-1880

RP = G. Rhalles and M. Potles (eds.) Σύνταγμα τῶν θείων καὶ ἱερῶν κανόνων, 6 vols. Athens 1852-1859

Syn = V. Beneshevich (ed.) *Ioannis Scholastici Synagoga L titulorum ceteraque eiusdem opera iuridica*, Munich 1937

Primary Source Abbreviations (separate recensions will be specified in-text)

Basilica = the Basilica (ed. H. Scheltema *et al.*, *Basilicorum libri LX*. Series A.1-8 (text); Series B.1-9 (scholia), Groningen 1953-1988)

CJ = Justinian's Code (ed. P. Krüger, *Corpus Iuris Civilis* vol. 2, Berlin 1877)
Includes the introductory constitutions *Haec* (p. 1), *Summa* (pp. 2-3), *Cordi* (p. 4)

CJC = "Corpus Iuris Civilis", a 16th C designation, but a useful shorthand for Justinian's Codex, Institutes, Digest and Novels

Coll14 = the Collection in Fourteen Titles (edns.: *Kormchaya, Pitra* 2.433-649, *RP* 1)

Coll25 = the Collection in Twenty-Five Chapters (ed. G. Heimbach, Ἀνέκδοτα. vol. 2, Leipzig 1840: 145-201)

Coll50 = the Collection in Fifty Titles (edn.: *Syn*)

Coll60 = the Collection in Sixty Titles (not extant)

Coll87 = the Collection in Eighty-Seven Chapters (ed. G. Heimbach, Ἀνέκδοτα. vol. 2, Leipzig 1840: 202-234)

CTh = the Theodosian Code (eds. T. Mommsen and P. Meyer, *Theodosiani libri XVI com Constitutionibus Sirmondianis et leges novellae ad Theodosianum pertinentes,* 2 vols. Berlin 1905). Trans. C. Pharr (Princeton, 1952)

Digest = Justinian's Digest (ed. T. Mommsen, *Corpus Iuris Civilis* vol. 1, Berlin 1872)
Trans. A. Wason *et al.* (Philadelphia 1985)
Includes the introductory constitutions *Deo auctore* (pp. xiii-xiv), *Omnem* (pp. xvi-xvii), *Tanta*/Δέδωκεν (pp. xviii-xxvix).

Ecloga = the *Ecloga* (ed. L. Burgmann, *Ecloga: das Gesetzbuch Leons III. und Konstantinos V.*, Frankfurt 1983)

Eisagoge = the *Eisagoge* [formerly *Epanagoge*] (ed. K. E. Zachariä von Lingenthal, *Collectio librorum juris Graeco-Romani ineditorum*, Leipzig 1852: 61-217 = I. Zepos and P. Zepos, *Jus Graecoromanum* 2: 236-368

Institutes = Justinian's Institutes (ed. T. Mommsen, *Corpus Iuris Civilis* vol. 1, Berlin 1872) Trans. P. Birks and G. McLeod (New York 1987)
Includes the introductory constitution *Imperatorium* (p. 2)

N = Justinian's Novels (ed. R. Schöll and W. Kroll, *Corpus Iuris Civilis* vol. 3, Berlin 1895)

NC14 = the Nomocanon in Fourteen Titles (edns.: *Pitra* 2.433-649, *RP* 1)

NC50 = the Nomocanon in Fifty Titles (ed. G. Voellus and H. Justellus, *Bibliotheca iuris canonici veteris,* Paris 1661: 603-660)

Prochiron = the *Prochiron* (ed. K. E. Zachariä von Lingenthal, Ὁ Πρόχειρος Νόμος, Heidelberg 1837: 3-258 = I. Zepos and P. Zepos, *Jus Graecoromanum* 2.114-228)
Tripartita = the *Collectio Tripartita* (ed. N. van der Wal and B. Stolte, *Collectio tripartita*. Groningen 1994)

Secondary Sources (common reference works only)

BNP = H. Cancik and H. Schneider (eds.) *Brill's New Pauly,* 15 vols. [trans. of *Neue Pauly* 1996-] Leiden 2002-
Delineatio = N. van der Wal and J. Lokin, *Historiae iuris graeco-romani delineatio: les sources du droit byzantin de 300 a` 1453*, Groningen 1985
DDC = R. Naz (ed.), *Dictionnaire de droit canonique*, Paris 1935-1965
Historike = P. Menebisoglou, Ἱστορικὴ Εἰσαγωγή εἰς τοὺς κανόνας τῆς Ὀρθοδόξου Ἐκκλησίας, Stockholm 1990
Peges = S. Troianos, Οι Πηγές του Βυζαντινού Δικαίου, 2nd edn. Athens 1999
RE = Pauly, A. and G. Wissowa (-W. Kroll) (eds.) *Real-encyclopädie der classischen Altertumswissenschaft* 1894-1978
Sbornik = V. Beneshevich, Канонический сборник XIV титулов со второй четверти VII века до 883 г., St. Petersburg 1905.
Sin = V. Beneshevich, Синагога в 50 титулов и другие юридические сборники Иоанна Схоластика, St. Petersburg 1914
Sources = H. Ohme "Sources of the Greek Canon Law to the Quinisext Council (692): Councils and Church Fathers" 2010: http://faculty.cua.edu/pennington/OhmeGreekCanonLaw.htm[1]

If not specified, **canonical texts** are drawn from *Fonti*, and systematic rubric texts from *Syn* (for the *Coll50*) and *Kormchaya* (for the *Coll14*).

Length considerations, and the large number of canonical citations, have not permitted both Greek and English to provided for most texts. **Translation** has thus been approached pragmatically. Most lengthier texts, and texts where the Greek seems unnecessary, have been presented only in English. Very short phrases, and citations made only to demonstrate particular lexical or grammatical points, have been left in Greek. Occasionally both English and Greek have been supplied, as necessary. Translations are mine unless otherwise noted (as are emphases).

Canonical numeration is according to *Fonti*. Page and line numbers are not specified unless specially warranted.

[1] This work is currently only published on the internet, ahead of its final version forthcoming in W. Hartmann and K. Pennington, eds. *History of Medieval Canon Law: Eastern Canon Law to 1500 A.D.* (Washington 2010). However, as the most up-to-date survey of its kind it is already indispensable. Lacking pagination, it is referred to by sections.

Volume, parts, page, and (where present) line numbers for all sources are indicated through successive separations by full stops. E.g. *Fonti* 1.2.3.15-16 = *Fonti* volume 1, part 2, page 3, lines 15-16.

Title and chapters in the **systematic indices** are indicated through successive numbers separated by full stops. E.g. *Coll14* 1.17 = *Collection in Fourteen Titles*, Title 1, Chapter 17.

Manuscripts citations are made as per convention, although locations have been anglicized and abbreviations have been kept as minimal as possible.

A serious problem in the field of Byzantine law remains the lack of a dictionary of Byzantine legal Greek.[2] The standard works of Liddell-Scott-Jones, Lampe and E.A. Sophocles do not give adequate coverage for late antique or Byzantine legal Greek. Supplementary **lexical works** consulted therefore include Avotins 1989, 1992 (both legal supplements to Liddell-Scott from the Novels and Codex of Justinian), Mason 1974 (a study of Roman Greek legal terms – concluding, unfortunately, with Diocletian), Pitsakes 1976,387-424 (a short but exceptionally useful glossary of legal Greek appended to an edition of the *Hexabiblos*), Roussos 1949 (a Greek-Latin-French dictionary of ecclesiastical legal terms), and Preisigke (1925- with supplements, for the papyri). For classical (Athenian) legal Greek the glossary in Todd 1993,359-402 is helpful. All of these sources will be cited normally, as necessary. Frequently, however, I have had to manually back-track words through the Basilica (a 10th C compilation of 6th C Greek translations and paraphrases of the *CJC*) to the Latin *CJC* and then to Latin legal dictionaries or textbooks (e.g. Berger 1953, Buckland 1963, Kaser 1955).

At the time of writing no **searchable electronic database** exists for the entire Byzantine canonical corpus, although *Syn*, which includes the full texts of the Apostles, the 4th and 5th C councils, and 68 canons of Basil, is on the *TLG* (#2879). Outside of these sources, lexical data, particularly in chapter 3, has been culled manually from *Fonti*, with reference to *Kormchaya* and *Pitra*.

[2] So Stolte 2006,3.

For non-canonical philological data I have very often had recourse to the *Thesaurus Linguae Graecae* (www.tlg.uci.edu), which is cited as *TLG*. All searches have taken place between 2007 and 2010. During this time no major additions relevant for our study have been made to the database, although the lemmatic search engine has been gradually improved; where this could affect my results searches have been re-checked as of April 2010.

ACKNOWLEDGEMENTS

Funding for this research was provided by the Social Sciences and Humanities Research Council of Canada and the Overseas Research Students Award Scheme. The Fellowship of St Alban and St Sergius also extended to me generous funding to attend scholarly conferences on more than one occasion. I am very grateful to all these organizations for their support.

Numerous individuals have played critical roles in the accomplishment of this doctorate. Above all I wish to extend my heartfelt thanks to my supervisor, Prof. Andrew Louth. Prof. Louth not only brought to my work a wealth of insight and learning, but provided constant moral support and encouragement in my pursuit of this often obscure and forbidding topic. I will always be grateful to him for accepting this project, for his faith in me to bring it to a conclusion, and for the great freedom he has extended to me in its development.

I am also deeply grateful to Dr. Ludwig Burgmann, Prof.Wolfram Brandes and the other members of the Max-Planck-Institut für europäische Rechtsgeschichte in Frankfurt who, during my visit in April 2009, granted me exceptionally free and open access to their microfilm collection, and patiently endured my endless questions. Similarly I wish to thank Dr. (Archimandrite) Grigorios Papathomas, then professor of church law at l'Institut de Théologie Orthodoxe Saint-Serge, for his warm hospitality and encouragement during my research trip to the Bibliothèque nationale in May 2008. I am also grateful to the staff of the Pontifical Institute of Medieval Studies in Toronto for granting me access to their extraordinary library during the final stages of this work.

The literature and sources of Byzantine and Orthodox canon law are often exceptionally difficult to find. I would like to extend special thanks to Ms. Eleana Silk, librarian at St Vladimir's Orthodox Theological Seminary in New York, for her frequent assistance in helping me gain access to many rare Russian and Greek works. Deacon Andrei Psarev, instructor in canon law at Holy Trinity Seminary in Jordanville, New York, also showed me constant kindness in assisting me with libraries in Russia. Similarly, I wish to thank Dr. Evaggelos Bartzis for his companionship and skills as an interpreter during my visit to the scholars – and bookshops – of Greece in November 2006.

This work emerges as the fruit of the mentorship and inspiration of many past teachers. Among these I would especially like to thank Prof. John Behr, dean of St Vladimir's Seminary, for his past and ongoing support, and Prof. Richard Schneider,

who as a professor in my undergraduate years ignited in me an abiding interest in the history of the church, and has continued to inspire and guide me.

The staff of the Department of Theology have given me their constant support. I am particularly grateful to Ms. Ellen Middleton, Postgraduate Secretary, for the many times she has gone above and beyond the call of duty to help me through the more intricate aspects of university administration.

Finally, I owe the very deepest debt of gratitude to my parents, Mark and Elisabeth. They have frequently offered me moral, emotional and financial support, particularly during the trying final year of this project. This dissertation would have been impossible without them.

For my grandfathers, Clint Murray Ferguson and Francis Kirkegaard Wagschal

INTRODUCTION

The present work is an exploration into the cultural history of Byzantine law, and more specifically, the cultural history of Byzantine church law. Its central concern is to illuminate the fundamental perceptions, categories, values, expectations, assumptions and structures that constituted the intellectual and cultural framework of Byzantine canon law — a set of dynamics that, borrowing loosely from Harold Berman, we may term a culture's legal *beliefs*.[1] In this, it seeks to complement more traditional legal-historical approaches which emphasize the history of legal institutions, legal doctrines, or, more recently, the manifold negotiations of power in legal processes. It is not, however, an attempt to illuminate the cultural history of Byzantium through law; it is an attempt to illuminate the cultural contours of Byzantine law itself. It is, in effect, an exploration into the Byzantine legal imagination.

Its particular task, experimental in places, is to unfold the cultural contours of law and legality from a close, at times almost literary, reading of the central texts of the Byzantine canonical tradition AD 381-883. These texts include not only the Byzantine canons themselves, but also the principal prologues to the canonical collections, and the tradition's first forays into systematization. From these texts – and, for the most part, from these texts alone – it will attempt to distill the fundamental legal architecture of the system as a whole. It is thus an attempt to gauge the extent to which these texts can be read to describe and "think" about their own legal world *as* a legal world.

As a cultural-historical study, this work is above all interested in how law was understood and perceived: how it was *supposed* to work. This is not unconnected from how it *did* work: expectations for the system's operations must be taken into account when evaluating evidence for its "real" operation. Nevertheless, this study is not directly concerned with the social or political-historical realities of the Byzantine system, except insofar as they help to illuminate cultural perceptions. Our chief emphasis is instead on what the legal anthropologists might call the "formalities" of law, i.e. the realities of the cultural imagination of law. As Kenneth Pennington has remarked, commenting on the traditional representation of Justice, "social historians record the number of weights on

[1] Berman 1983,vii.

her scales but do not see justice through her eyes"[2] – here we are very much concerned to look through Justice's eyes.

The method employed in this work is not, however, that of traditional "history of ideas". It is not – or at least not only – an inquiry into the meaning of particular concepts or ideas ("law" or "justice"), abstracted from their various contexts, and analyzed for their changing intellectual content over time. It is instead more akin to legal ethnography. It will thus attempt to read the central prescriptive texts of the Byzantine church as a set of legal phenomena that in their very structures, patterns of expression, strategies of composition and even stylistic tendencies reveal fundamental cultural-legal beliefs and categories. In this type of reading direct assertions of legal belief and thought – definitions and statements of the nature of law and legality – are a critical, even controlling, part of the evidence, but still only a part. Unstated, unconscious and implicit assertions are equally important, and thus questions of ethos, images, metaphors, and fundamental dynamics and "shapes" of legal thought must also be taken into account. Only when all of these factors are considered can we hope to arrive at a nuanced and comprehensive, perhaps even cognitive, description of the Byzantine conceptualization of law and legality.

This work has been conceived against the background of four major sets of disciplinary problematics.

The first set of problematics is constituted by Orthodox canon law. Written in a theology department, this study was originally conceived as a study in Orthodox canon law. This (probably) remains its primary orientation and application. It arose, in particular, in response to the highly ambiguous and contested *status quaestionis* of modern Orthodox legal theory.[3] This problem may be summarized, albeit crudely, in terms of two competing positions.

On the one hand, the mainstream academic discipline of Orthodox canon law, developed mostly in the eastern and southern European academies since the mid-19th C, and heavily influenced by the continental *ius commune*, has tended to treat Orthodox canon law in categories and terms derived from modern western formalist legal theory,

[2] Pennington 1994,206. Justice receives her blindfold only in the 15th C. See Curtis and Resnik 1987,1755-56; Ziolkowski 1997,18; cf. Maguire 1994.
[3] Recent overviews of the state of Orthodox canon law include Corecco 1992, Erickson 1991a, Meyendorff 1978, Ohme 1991, Patsavos 1981.

secular and canonical.[4] Thus, to varying degrees, the many "manuals" of the discipline – the chief vehicles of this tradition[5] – explore the traditional texts in terms of abstract categories of rights, duties and powers, and are concerned with questions such as the valid promulgation of legislation by competent authorities, the constitution of canon law as a valid branch of law, the disciplinary autonomy of law (versus theology), the formal mechanisms for legal change, the development of innumerable formal distinctions and definitions (e.g. *ius sacrum* and *ius humanum*; "doctrinal" canons and "disciplinary" canons, validity and liceity, *potestas ordinis* and *potestas jurisdictionis*) and, above all, the consistency and comprehensiveness of canon law as a logical system of formal norms. Broadly, then, representatives of this tradition seek to explore Orthodox canon law as a "legal science", and as a result, the entire conceptual and value apparatus of modern continental formalist-positivist legal culture – on which more in a moment – is transferred to the traditional Orthodox texts.

The "fit", however, of this apparatus to the traditional texts is uneasy, to say the least. Very few of its concepts or distinctions are explicitly present in the Orthodox material, and few can be applied easily or consistently. Indeed, Orthodox canonical texts are distinctly misbehaved by modern legal-scientific standards. A classic example is the many attempts to establish the Orthodox equity notion, οἰκονομία, as a serviceable and consistent legal concept: the traditional usages of the term regularly evade convincing conceptual definition.[6] This ill-fit has also been exposed even more convincingly by the various pleas (often by representatives of this manual tradition) for a modern Orthodox legal codification. Such voices draw out at great length the dissonances of the traditional texts with modern expectations: contradictions,

[4] No comprehensive history of the modern Orthodox discipline exists, although it is sorely needed. For a sketch of the Greek experience, Troianos 2001; the Russian, Tsipin 2002,19-23; the Romanian, Stan 1974; also, generally, Potz and Synek 2007,13-23.

[5] No comprehensive list exists, although see Milaš 1902,37-41 for 19th bibliography. Those consulted here include Berdnikov 1889, Boumis 2003, Christophilopoulos 1965, Konidaris 2000, Milaš 1902 (one of the very few not restricted to one national tradition), Ostroumov 1893, Panagiotakos 1957, Pavlov 1902, Rhodopoulos 2005, Sakellaropoulos 1898, Sokolov 1851, Troianos 2003, Tsipin 2002. The only manual currently available in English is a modified translation of Rhodopoulos 2005 (Rhodopoulos 2007; see also Patsavos 1975). These manuals are very similar to Protestant and Catholic canonical manuals of the 19th C. In Greece, the manual tradition divides, if sometimes roughly, into "ecclesiastical law" (treating broadly secular law relating to the church, and its relationship with canon law; so Christophilopoulos 1965 or Troianos 2003, for example) and "canon law" (treating the church's own law; so Boumis 2003 or Rhodopoulos 2005); for a list of Greek ecclesiastical law manuals, Troianos 2003,19-20.

[6] See especially Thomson 1965; Erickson 1988, 1991b, 1997; Ohme 1991,235-236; also Meyendorff 1978,104-105. Further bibliography in Potz 2007,240-241.

repetitions, obsolescence, confusion.[7] Even serious points of divergence in substantive law are often noted, and deplored, such as in the different treatments of rebaptism of non-Orthodox Christians in different Orthodox churches.[8]

The other stream of Orthodox canon law reflection may be read as a response to this westernized "manual" or civilian tradition, and is almost a non-theory of law. Much more diffuse, this view tends to emerge more as a background sensibility or set of recurring emphases than as a strongly held set of positions.[9] It is nevertheless centered around the conviction that Orthodox church law should *not* be conceived of – or at least not primarily – in "juridical" or legal categories at all. The canons must instead be understood as only expressions of deeper metaphysical realities, and as such are quite different from other types of law: "Although the holy canons constitute the Church's law, they nevertheless differ essentially from all other types of law...They are not to be understood as legal regulations, but as the practical application of the church's dogmas"[10]; "[The canons] are not, properly speaking, juridical statutes, but the applications of the dogmas of the Church".[11] Whereas the "manual" tradition thus casts Orthodox legal theory as an appendage of 19th C European legal science, this stream tends to cast canon law as an appendage of one or another modern ecclesiological formulations or of a generalized pastoral praxis. Different authors articulate this conviction in different ways, but appeals are characteristically made to concepts such as "canonical consciousness",[12] or "jurisprudence of the Holy Spirit",[13] or various precepts of existentialist freedom,[14] or a narrative of a pre-Constantinian non-legal legal purity,[15]

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[7] Most notably, and recently, Archontonis 1970, 43-61; see *ibid.* 33-41 for a history of the Orthodox codification movement.

[8] For a sampling of such problems, Archontonis 1970, 43-61; Christophilopoulos 1957; Erickson 1991b; see also n. 3 above.

[9] Examples of this type of thinking, ranging from express argumentation to passing expression, include Afanasiev 1933, 1936; Deledemos 2002; Erickson 1991a; Evodkimov 1959,185-187, 1962,181-183; Lossky 1944,175; Meyendorff 1966,111-112, 1978a,99-103; Patsavos (Kapsanis) 2003; Schmemann 1979,33-34, 58-61; Yannaras 1970,173-193. Afanasiev and Yannaras are perhaps this position's most prominent proponents. See also the trenchant – if not always well-informed – critique of such positions in Correco 1992,70-77; also Ohme 1991,234-239. The context and origins of this "anti-legal" trend in Orthodox thinking has never been investigated at length, but important context, especially as relates to tendencies in 19th C Russian thought, is given by Nichols 1989,1-33 and Walicki 1987,9-104. The influence of J. Mohler (see Congar 1970,415-423) and R. Sohm (see below, and n. 26) may be suspected frequently, when not explicitly acknowledged. On Sohm and Afanasiev in particular, see now Borbu 2009.

[10] Patsavos (Kapsanis) 2003,186, 188. This ecclesiological perspective may be found most elaborately in Afanasiev 1933, 1936, and also Christopoulos 1976,253-266.

[11] Lossky 1944,175.

[12] Very frequent; especially in Afanasiev.

[13] Meyendorff 1981,207-208.

[14] Yannaras 1970.

[15] Erickson 1991a.

or vague warnings against "legal mentalities"[16] and "reducing" canon law to legal categories[17]. Not surprisingly, this position often emerges in the polemical context of establishing a "non-legal" eastern Christian identity over and against the "legalist" west.

This stream of thought maintains as uneasy a relationship with the traditional texts as the manual tradition. First, many of the concepts and categories (e.g. "canonical consciousness") employed by representatives of this "anti-legal" tradition find no greater resonance in the traditional texts than the civilian doctrines of the manual tradition. More profoundly, these theories simply downplay the importance in the tradition of a large set of formal regulative texts and processes that in the tradition itself – as we will see – apparently occupy a very central, high-status, and even semi-sacral position, and seem to be understood to function as a real system of formal normative ordering.[18] Instead, in these "ecclesiologizations" of canon law the canons tend to emerge as something to be bypassed or transcended: one must constantly strive to "go beyond 'canons' and 'canon law'"[19], or one must attain to a higher "canonical consciousness" that is apparently above and beyond the canonical texts themselves.[20] This attitude is revealed above all in the almost complete lack of any attempts by representatives of this tradition to develop their theories into a workable system of canonical dispute resolution or ordering, or to address even the most basic questions of normative regulation (i.e. what are the rules, who makes the rules, who adjudicates the rules, who can change rules) – or even how their theories point to the resolution of contemporary canonical problems. In practice, canon law is thus never more than a topic for an occasional article on ecclesiology. Apparently, the canons, as a formal set of rules, are simply not worth the effort of sustained theoretical engagement. The overall message seems to be then that "legal" reality is simply not a proper or important part of Orthodox reality – despite the presence in the tradition of a large set of texts that seem to suggest otherwise.

Modern Orthodox legal theory therefore tends to be poised precariously between two problematic positions: church law is either 19th C civilian law, or it is no real law at all.[21]

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[16] Deledemos 2002
[17] E.g. Meyendorff 1978,103
[18] cf. Nichols 1989,4 on the high status of law in the early Russian tradition.
[19] Erickson 1991a,21.
[20] See Ohme 1991 for the hermeneutical difficulties of this type of theory.
[21] Cf. Erickson 1991a for an assessment of the tradition as composed of 'legalists' and 'anarchists', or L'Huillier 1964 on *jurdicisme* and *spiritualisme*.

This situation – which is much more nuanced and complex than this brief description implies – should be understood as the result of a struggle in modern Orthodox legal thought to find a language or set of formulas to take account of a legal tradition that simply does not fit into the categories of modern legal culture. The manual tradition, keenly aware of the existence in the tradition of a prominent and detailed mass of formal written norms, and that this mass of norms is apparently a functional system of ordering and dispute resolution, attempts to make sense of this reality in the language and categories of modern legal science – but with only partial success. The "ecclesiological" tradition, keenly aware of the extent to which the canonical tradition cannot be adequately described by the tenets of modern legal science, looks to ecclesiology or philosophy to find ways of articulating the legal dynamics observed – but in so doing tends to arrive at only vague formulations that mostly serve to marginalize and stigmatize close study of the church's formal normative tradition at all.

Curiously missing on all sides of the question, however, is precisely our concern here: an examination of how the eastern canonical tradition *itself* defines and describes law and legality, that is, how the tradition talks about itself as law, thinks about rules, relates law to other types of knowledge, and sets expectations for the law's operation. The manual tradition starts with the categories of modern western civilian and canonical legal science, and then approaches the material; the "ecclesiological" positions start with modern ecclesiological presuppositions and then theorize about what the tradition should look like (and not what it does look like). Neither side *begins* therefore by carefully reading the traditional texts for their own categories and presuppositions about law and legality. Neither side, in short, examines the actual legal contours of the tradition itself, nor does either side submit its own formulations to the critique of the tradition itself: do the categories of modern legal science do justice to the texts? do modern ecclesiological theories adequately describe the position and nature of the canonical rules as found in the tradition itself? Both sides also tend to assume that the only "proper" type of legal system is a modern formalist one – to be either accepted or rejected.

This thesis aims, in contrast, to provide the first steps towards the formulation of a new "introduction" to Orthodox canon law that takes its starting point from a careful and attentive reading of the traditional texts themselves. In this canonical *ressourcement* I will suggest that modern legal anthropological and legal theory have

long opened new horizons for the appreciation and theorization of many of the strange dynamics present in the Orthodox legal texts. If these tools are employed, the instincts of both major positions can be confirmed: Orthodoxy does have a real legal system, but it is a legal system that functions according to a very different set of presuppositions from what we are accustomed to. The Orthodox legal-theoretical imagination simply needs a little expanding.

The second set of problematics – a much more peripheral one – is constituted by historical theology or patristics. Here our concern is simply to reaffirm and advance the study of the canonical texts as an important part of the patristic textual tradition. Our central insight is the reminder that the canons *are* patristic texts, and that they are one of the primary – perhaps the primary – patristic witnesses to the perception of law, legality and order in the early church. (Also, I think, primary witnesses to exploring patristic attitudes towards power and social control.) The close examination of how these texts embody law, and how they "do" law, is thus an essential complement to more traditional explorations of what the fathers say *about* law – the theories they expound, or the concepts that can be unearthed in their works.[22] In particular, it is important that not only individual sources or canons be examined for information on particular topics – "mined" for ecclesiological or sociological data – but that the tradition *as a distinct legal whole*, as embodying a legal culture, be taken into account. In this the canonical texts must not only be read only in their original compositional contexts – a particular father's biography and *opus*, or the particular circumstances of a council – but also as placed and found within the canonical tradition itself. The canons of Gangra, for example, need to be not only read in terms of 4th C debates over asceticism in Asia Minor, but also appreciated for their role in defining and establishing ecclesial rule and power culture for the next millennium (and more) as part of the core canonical corpus of virtually every major Christian tradition. The after-life of sources as part of the canonical corpus is at least as worthy of investigation as their points and circumstances of origin.[23]

Third, this work seeks to contribute to the history of Christian canon law. Here the work takes an almost post-colonial turn in its concern to carve out for Byzantine

[22] Here it is important to recall that the discipline of ecclesiology is a late medieval and Reformation-era invention; before this time, the canonical texts are not so much an important source for ecclesiology as much as they *are* ecclesiology: they are the central and most concrete locus of the church's reflection on church order. Cf. Lossky 1944,175; Meyendorff 1983,79-80. On the origins of ecclesiology as a subject, Congar 1970,217, 270 *et passim*.

[23] Investigations of canonical *Nachleben* have been stymied particularly by the tendency to treat canon law as the step-daughter of *Konziliengeschichte*. Here the influence of Hefele-Leclercq is no doubt pervasive; Hess 2002 is a modern (moderate) example.

canon law a more significant place in a field dominated by the narratives of the western Christian experience. These narratives, although not generally hostile to Byzantine canon law (it is often little more than a marginal curiosity), have created very little space for its appreciation. To put it a little, but only a little, crudely, the Byzantine experience tends to become submerged in two master narratives: 1) as a part of the story of the slow *decline* of church law from the original charismatic rule-purity of the pre-Constantinan church into the corrupt legalization and secularization of the post-Constantinian church (broadly a Protestant narrative);[24] or 2) as a primitive and backward sideline in the story of the slow but inevitable and providential *evolution* of church law towards the 12th C western legal developments, particularly the development of canon law as an independent legal discipline (broadly a Roman Catholic narrative).[25] Very rarely has anyone – even the Orthodox, who tend to internalize one or other of these narratives – tried to consider how Byzantine canon law of our period might constitute a coherent, non-defective legal whole in and of itself, with its own particular sense of consistency, its own perfectly interesting, if sometimes odd, categories, concerns and agendas, and as quite content with its own "state" – i.e. not in permanent need of reform from decline or development into something else. In other words, rarely has the discipline explored Byzantine canon law, or even the western pre-12th C canon law (with which it shares many characteristics), as a mature legal world worthy of detailed exposition in itself, and with its own "narrative".[26] This is precisely our principal concern here.

The fourth set of problematics is furnished by the history of late antique and Byzantine law. These two disciplines – or perhaps this one discipline, as the two

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[24] Most notably Sohm 1923, but so Erickson 1991a, Hess 2002, Ohme 1998.

[25] Examples of this evolutionary reading of western canon law include Brasington 1994 (where prologues are studied as "evolving" towards the values of sophisticated jurisprudence); Cosme 1955a,63 (with church law moving along the "way to internal perfection"); Fournier 1931,75-77 (with systematic collections marking "progress" in the still "embryonic" science of canon law); Gaudemet 1994,viii (the first millennium characterized as "a slow ascension", moving towards the "golden age) and Kuttner 1960, 1-3 (pre-12th C law as "dissonance" followed by "harmony"); see also Cosme 1955; Ferme 1998,195-202; Kuttner 1975,199-207. Sohm 1918,3-8 provides many examples from the older literature of the narrative of the "Unentwickeltheit und Ohnmacht" of canon law for a thousand years. Such tendencies are, however, less marked in more recent surveys, such as Pennington 2007 or Reynolds 1986. See the criticism of Nelson 2008,303 of this type of narrative.

[26] The one ironic exception is Rudolph Sohm 1918, 1923. Although a key expositor of the first thesis, Sohm's concern to black-ball the 12th C western developments as the critical moment in the church "legal fall" led him to consider the 4th-11th C developments in a more serious and sympathetic light. As a result, his concept of the "sacramental" a*ltkatholische* church law (1918,536-674; 1923,2.63-86), despite many problems, remains among the most insightful assessments of pre-Gratianic law, eastern or western, ever committed to paper. For reflection, and extensive bibliography, on the tumultuous reception of Sohm's theories, Congar 1973; also Brasington 2001.

sometimes merge – provide the essential historical backdrop for any study of Byzantine canon law. It is also in these fields, however, that the lack of an attentive cultural-historical reading of the type aimed at in this work is sometimes most sorely felt.

It is (I propose) not too much of a simplification or exaggeration to suggest that the central problem of these fields has historically been the apparent defectivity of their subjects: late antique and Byzantine law simply do not seem to "work" as we expect them to. In practice, because these fields have been traditionally dominated by academics with continental legal educations, this has meant that the expectations of modern legal formalism, as developed in western Europe since the 12th C, have not been sufficiently satisfied. Expositions in both fields have thus traditionally centered on the law's many infractions of modern formalist propriety/piety: doctrinal coherence and elegance seems elusive; the system becomes oddly rhetorical; jurisprudential activity ebbs; facts and law and law and morality become "confused"; equity and substantive justice tends to win over procedural regularity; legislation becomes embarrassingly ornate and conceptually clumsy; juristic autonomy (from political interference) and creativity wane; the rule of law is poorly observed; and laws generally seem to lose their importance and efficacy as instruments of policy and dispute resolution.[27]

The traditional response to these "failures" has been the relegation of late antique and Byzantine law to the familiar narratives of decline/corruption or primitivism/ preservatism.[28] In the former, late antique and Byzantine law appears as gradual slipping away from the conceptual heights of the classical jurists: "Roman classical law rises like a mountain above the common level of the others [other ancient laws] and it slopes down again to the previous level in the Byzantine period"[29]. In the second, it appears as a static repository of ancient Roman traditions that are

[27] For a flavour of these themes and assessments in the older literature, see for example Biondi 1952,1.1-2; Jolowicz 1952,517-538; Kunkel 1964,150-154, 177-181; and see the discussion in Pieler 1978,351-355, 361-365 (with many further references); 1997a,592-593; Ries 1983,167, 210-223. In later Byzantine law, see above all Simon 1973, and the references in nn. 40-44 below. Some of these characteristics, particularly the loss of classical doctrinal and terminological precision and sophistication, were the basis of Ernst Levy's famous, but now mostly defunct (in its technical aspects), notion of *Vulgarrecht*. On this concept, and its variety of its usages, see now especially Liebs 2008; also Wieacker 1988,2.207-218 and the references in n. 28.

[28] The idea of late antique and Byzantine law marking a "decline" is so commonplace as to hardly need comment; see the discussions in Garnsey and Humfress 2001,53-55; Honoré 2004,109-132; Humfress 2007,2-3 (and Humfress 1998,8-10 with more examples); Matthews 2000,23-29; Pieler 1997a,565-566. The related idea of Byzantine law as a kind of ossified repository, looking forward to greater glory, is also common, as noted in Stolte 1998,266-269; 2005,58. Pieler 1997a,566 stills opts for this latter view.

[29] Pringsheim 1944,60.

underappreciated and misunderstood: the Byzantines lack the "spirit" of Roman law,[30] and their law possesses a "poverty" of content with a tendency towards the total mixing of law and morality.[31] However, it is conceded, the Byzantine at least preserved knowledge, which could await future use by those more capable – meaning the great flowering of 12th C jurisprudence and, beyond that, the European development of the *ius commune* generally (culminating, perhaps, in the 19th C German *Begriffsjuriprudenz*).

Recent scholarship, of course, has been much less inclined to resort to either of these narratives. Here, however, a certain bifurcation in the discipline may be detected. The late antique wing of the discipline has tended to confront these narratives in one way, and the Byzantine wing in another. The latter's approach has been very much a direct inspiration for my own.

The Byzantinists, particularly those associated with the Max-Planck-Institut für europäische Rechtsgeschichte in Frankfurt, have tended to address the problem of decline by completely rethinking the formalist cultural-legal paradigm that generated it in the first place. Instead of trying to fit the observed phenomena into a formalist mold, and to find political or social excuses for its failures, they have tended to formulate a new paradigm to take account of the changes witnessed – i.e. to attempt to read the "failures" as conforming to a new and very different cultural *ideal* of law.

The pioneering text of this stream of thought has been Dieter Simon's 1973 essay *Rechtsfindung am byzantinischen Reichsgericht*.[32] In this study, the decisions of a judge of the Hippodrome, Eustathius, preserved in a mid-11th C Byzantine legal textbook, the Πεῖρα, are analyzed in terms of modern continental legal-scientific *Rechtsdogmatik*. Not surprisingly, Eustathius' decisions come off badly: terminology is varied for purely aesthetic reasons; decisions that could be based on laws are based up equity; similar cases are treated completely differently and with reference to different laws; laws are sometimes sought post-decision to provide a pre-determined penalty; and interpretative rules run wild.[33]

To explain these results, Simon does not, however, declare the Πεῖρα an example of primitivism or decadence, nor even make recourse to the well-worn narrative of Byzantine political corruption. Instead, he considers that the observed

[30] Hammer 1957,1; cf. Stolte 2003,92 "never in any moment of its history did Byzantine law manage to surpass the intellectual qualities of its great Roman ancestor, the 'classical' Roman law of Antiquity...the encyclopedia [the Digest] was never spiritually digested..."
[31] Giaro 2006a,285-286.
[32] Simon 1973; and see especially the discussion and expansion on Simon's work in Pieler 1978,346-351.
[33] Simon 1973 13-23.

phenomena can be explained if we accept that rhetoric itself is the main dynamo of Byzantine *Rechtsfindung*, and that the laws are employed quite consistently if we consider them analogous to rhetorical *topoi*.[34] In effect – although these are not quite Simon's words – Byzantine law is functioning as a grand literary enterprise, focused on justice, and with law as one (and only one) potential pool of literary tools for building an argument. Other tools can also be employed, including any type of reasoned argument, or citations for classical authors; but, as Simon puts it, one never so much argues "from" the law as "with" the law.[35] Indeed, the author of the Πεῖρα at one point remarks that "for this decision he [Eustathius] *also* cited laws"[36] (apparently they are optional); and elsewhere a decision is praised first for its elegant and morally sound qualities, and *then* for the fact that it also included legal citations.[37]

Laws nevertheless remain important in this world, and Simon includes many examples of quite sophisticated technical rule arguing and application. One reason for this is that they remain closely connected to the authority and person of the semi-divine emperor. Indeed, Simon suggests, every Byzantine hearing is essentially an extension of the emperor's personal jurisdiction.[38] But this itself tends to heighten the degree of equity in the system, as the emperor's decision is beyond rational critique or the demand for juridical consistency – it is always a quasi-divine statement in the realm of the Just and the Good.[39] In effect, laws must always be read in light of a basically substantive criterion: the emperor's Justice.

In very few pages, then, Simon turns on its ear any expectation of a Byzantine legal formalism, and starts to sketch a reasonable alternative centered around the realization of the quasi-divine substantive justice of the emperor, and the ideal of the negotiation of legal rules in the context of much broader set of literary and cultural values, all loosely governed by the expectations of an ancient rhetorical education. Modern formalism not only does not appear as an ideal here, but its core values (on which, more below) make little sense: conceptual consistency is overruled by concerns for aesthetically pleasing and rhetorically and morally consistent decisions, and judgments are *intended* to realize extra-juridical ideals of justice. The place here for many other features of modern formalist systems – an independent and "creative" expert

[34] On this particularly, Simon 1973,18-23
[35] Simon 1973,20.
[36] Cited without reference in Simon 1973,21; emphasis Simon's.
[37] Cited without reference in Simon 1973,13.
[38] Simon 1973, 29.
[39] *ibid.*

judiciary, forensic agonism, technical jurisprudence, the rule of law, the autonomy of law, and even the ideal of submitting to formal rules at all – is far from clear.

Numerous other studies in Byzantine law have since confirmed and continued to build upon this picture. Studies of other juridical decision, for example, have tended to reinforce the low place of laws and technical legal concepts in legal processes: general extra-legal moral or metaphysical considerations, and the rhetorical know-how of presenting them, are often more prominent than the real juridical construction of justice.[40] As Haldon notes: "Judges were not...expected to fulfill their obligations through applying the law, in a modern sense. On the contrary, the law they applied was the morality of the society – this replaced the normative legal framework – interpreted through the prism of inherited legislation...."[41] Law is essentially an exercise in applied morality. Similarly, the degree to which later Byzantine legislation disappoints as the policy instruments of an active modern-like positivist legislator has become increasingly clear. Haldon agains puts it well: "the legal 'system' became less a practical instrument for intervening in the world of men...but more a set of theories which represented a desired...state of affairs...Imperial action was thus not directed at emending laws to conform to reality, but rather at emending reality to conform to the inherited legal-moral apparatus."[42] Legislation thus emerges increasingly as a highly sacralized and symbolic production, more the product of God than a secular emperor, and with the task of providing a symbolic framework for understanding the world and impressing and internalizing moral and metaphysical lessons – not necessarily addressing "real" legal problems (although it does this too – occasionally).[43] In this sacralized world, not surprisingly, standard legal abrogation principles such as *lex posterior derogat legi priori* – although known and understood – have disturbingly little meaning, and little consistent use (how do you abrogate a divine law?).[44] Similarly the rule of law and the relationship between secular law and church law can never seem to find clear conceptual articulation or delineation.[45] Consistent legal-dogmatic architecture of any kind is simply difficult to identify: legal concepts and techniques are known, and occasionally employed, but they are somehow not very important.

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[40] For example, Dennis 1994; Kazhdan 1994; Laiou 1994; Macrides 1990, 1992, 2005; Papagianni 2005; Pieler 1970.
[41] Haldon 1990,278.
[42] Haldon 1990,249.
[43] In addition to Haldon 1990 see Fögen 1987, 1989; Lokin 1994; Simon 1994; also Lanata 1989a.
[44] As n. 43; also Fögen 1993,67-68; Pieler 1978,346, 1991; Stolte 1991, 1991a, 2008,695. Cf. also Triantaphyllopoulos 1985,7-8 on the Greek principle of *lex prior derogat legi posteriori*!
[45] See Fögen 1993,68-72 for a summary of recent research.

In late antique law, in contrast, the approach to confronting the narrative of decline has tended to take a very different tact. Instead of rethinking the propriety of applying a formalist legal mould to late antique law, scholars have tended – with exceptions[46] – to be more concerned to show that the "failures" of late antique law were simply not as bad, widespread or meaningful as they appeared: late antique law was not so corrupt as usually thought; jurists were still present and active; codification and legislation was still creative, even learned, and more doctrinally coherent than it first appears; juristic activity was not so closely controlled by the centralized state as sometimes thought; the rhetorization of legislation was not as complete, new or significant as it seems; the emperor was not so overwhelmingly in control of law as he seemed to be, or as arbitrary as he appeared, and participation in the legislative process was broader than often thought; laws were more efficacious than the old narratives allow; and (thank goodness!) there was still plenty of room for clever legal professionals to "play" the system.[47]

All of this we must accept as true, at least for the 4th and 5th C, and perhaps somewhat later. Nevertheless, it is difficult to shake a nagging worry that many of these recent studies are somehow "keeping up the legal appearances". Certainly the unstated implication of most of these studies seems to be that the only way late antique law might be possessed of a real legal experience is if it conforms to the demands of a modern-like formalist-positivist system, complete with an ongoing and quasi-independent juristic science, a responsive and creative legislative center still intent on effecting policy through laws, the rule of law, and a strong emphasis on resolving disputes through the consistent logical application of formal legal rules. Whether any of this, however, corresponded to the actual legal-cultural ideals of late antique society is rarely asked. As a result, in their very attempt to confront the older narratives of decline, these studies often appear to have internalized the legal prejudices of these same narratives. Certainly key legal-cultural issues are left unaddressed: to what degree were jurisprudence and jurists valued in legal processes? was doctrinal legal creativity a legal-cultural ideal? was juristic autonomy an ideal? were carefully crafted and

[46] The best example is probably Biondi 1952 who in formulating his "Christian" Roman law does seem to suggest a rethinking of the very fabric of Roman legal culture; in this respect – that of his overall approach – I think the importance of his work has not been sufficiently recognized. Stroux 1949, and the broader conversation about the early rhetorization of Roman law, perhaps also opens the door to such a re-conceptualization of the nature of Roman law, but in practice seems to remain mostly confined to narrow questions of the influence of specific rhetorical concepts on Roman juridical doctrine.

[47] Here I would broadly count the approaches of, for example, Harries, Honoré, Humfress, Liebs, Matthews, Sirks and Voss; also Pieler 1997a.

doctrinally coherent legal documents more valued than more "rhetorical" ones, even in formal legal processes? was anyone particularly bothered that the emperor was the sole font of law, and if not, why not – and what might be the legal theoretical reasons for this? was the "rule of law" a positive or useful value? what were ancient criteria for an "effective" law? was formal procedural consistency a value? In short, rarely does anyone explicitly ask if modern-like instrumental legal formalism was itself a legal value in late antiquity and beyond.

Two reasons might be suggested for this difference in approach. First, late antique law is undoubtedly simply more formalist in its general orientation than its Byzantine successor: the Romanist vision of a legal system is not so hopelessly dissonant with these texts as in the later Byzantine period. It is certainly possible – and perhaps desirable – to maintain its ideals in the historiography of the late antique period. Second, and perhaps more importantly, much recent literature in late antique law has taken a distinctly socio-historical turn. As a result, many scholars are simply no longer interested in exploring the intellectual architecture of late antique law, decline or no. More important is providing accounts of its socio-political realities, and in particular the varieties of negotiations of power of which law is both part and vehicle. Many recent studies thus may treat intellectual-cultural issues, often very perceptively, but their real argument is centered on affirming that, for example, late antique law can be read as an interesting, creative and diverse set of socio-political interactions; legislative processes were informed by a surprisingly dynamic set of figures and influences; or the rhetorical character of the legislation played an important role in broader patterns of power-negotiation. For these issues, the matter of the intellectual or cultural "decline" of law, or indeed, the nature of late antique law as a coherent cultural whole – the intellectual and cultural underpinnings of these phenomena – is simply not a terribly relevant question, and can be sublimated into descriptions of social practice. Certainly the intellectual-cultural aspects of decline need not be addressed very directly. Further, the cultural-historical problems that are raised, such as the construction of authority, perceptions of punishment, the textures of imperial propaganda, or the role of law in identity-formation, tend to be more about the interface of law and culture than the ancient culture of law *per se*.[48]

There are, however, *prima facie* many good reasons to rethink whether or not formalist legal operations should be assumed as a particularly central cultural ideal even

[48] For these last, see for example Harries 1999, 2000 or the studies in Matthisen 2001.

in late antiquity. The work of John Lendon and Peter Brown, for example, has demonstrated the extent to which late antique aristocratic power-culture was dominated by relatively informal, yet deeply internalized, codes of *paideia*, friendship and honour. Into this world technical legal dispute resolution fits only awkwardly.[49] Late antique legislation too, with its sacral epithets, morally and religiously charged language, issuing from emperors who are increasingly stepping into the Platonic/Hellenistic (and now Christian) model of kingship as a semi-divine mediator between heaven and earth, the "law animate", hardly encourages the conceptualization of laws as the highly manipulable and instrumental rules of a modern secular positivism/formalism; they seem much more like the numinous, divine mandates of a sacred law.[50] Certainly the well-known rhetorical texture of the laws does not, in fact, easily lend themselves to be "used" in a logical rule-calculus; they suggest a much more literary manner of employment in a complex and sophisticated set of value negotiations.

Perhaps most importantly, and to an extent that is not sufficiently taken account of in the literature, the entire classical Greek cultural tradition that underlies the late antique synthesis clearly does not privilege formal or "scientific" jurisprudential work at all – and as is well known, hardly contains any examples of it.[51] Indeed, it is not difficult to find a downright stigmatization of formal rule-work and rule-reasoning, and of rules generally. Plato's vision of law, for example, tends to view laws as somewhat unfortunate necessities, ideally to be transcended, but if not, only justified by their assimilation to educational tools and ideally merely the instrument of the divine philosopher-king.[52] Strict rule adherence of straight commands is thus mostly a matter for slaves – not for the free, for whom law functions as yet one more means to the ethical education of the soul, and should be persuasive and rational.[53] In any case, law is very much more about virtue than rule-adherence *per se*, subordinated to justice, and

[49] Brown 1992,35-70; Lendon 1997,176-236.
[50] On this complex of image and concepts, its continuity and its (increasing) dominance in late antiquity, see Centrone 2000; Dvornik 1966,2.672-723 (on the Christian usages; on the Greek, 1.132-277); Fögen 1987, 1993,43-49; Garnsey 2000; Garnsey and Humfress 2001,25-51; Kelly 1998; see also Enßlin 1943.
[51] For example, Jones 1956, 292-308; Todd 1993,10-17; Triantaphyllopoulos 1985,31-35; Wolf 1975.
[52] On Plato's general legal theory, in a variety of contexts, Cohen 1995,43-51; Dvornik 1.179-183 (*et passim*); Jones 1956,1-23; Kittel 1993,1025-1035; Laks 2000; Letwin 2005,9-41; O'Meara 2003; Romilly 1971,179-201; Rowe 2000; Schofield 2000. There are various ways of harmonizing Plato's sometime contradictory statements about law, but I think there can be little question that the *Rechtstaat* is a distinct second-best solution. Certainly it must be firmly embedded in a strong extra-legal philosophical and pedagogical framework.
[53] See especially *Laws* 720-723. Cf. Lendon 1997,236, where it is noted that the mechanical-like operation of a modern rationalized bureaucracy is better compared to a Roman slave workhouse than the Roman government (which he likens to a soccer team).

part of a much broader pedagogical program.[54] Greek rhetoric too, despite considerable attention to forensic oratory, and unquestionably the ability to function as a kind of legal technique,[55] has a notably minor and even stigmatized place for real legal reason of a modern formalist flavour; argumentation is prototypically around questions of moral qualities of persons and substantive justice.[56] Even classical Greek procedure, embedded and preserved for late antiquity in the canonical rhetorical speeches, seems to have had an allergy to much formalism, allowing considerable latitude to judges in arriving at decisions, unrestrained by technical and strict rule adherence and even laws– very like the Πεῖρα, in fact.[57]

Whatever the classical Roman law's own formalist proclivities or potentials, therefore, there are at least a few critical indications in late antique culture that suggest that a formalist-positivist legal paradigm should not be too quickly or automatically assumed as a late antique legal-cultural ideal. The "cultural cards" are at least in part stacked against it. This work, however modestly, and however restricted its scope, will hopefully serve as yet one more indication of this.

None of these four sets of problematics are the explicit topics of this work (although we will return to them in the conclusion). This study will instead seek to address each indirectly by providing a *type* of study that is hopefully valuable for them all: a careful description and analysis of the cultural and intellectual contours of at least one ancient Greco-Roman normative structure, Byzantine canon law, as a coherent whole, and as it may be read to describe its own legal world.

The study will be divided into four chapters. The first two chapters will treat how Byzantine canon law is framed by the tradition. In chapter one, we will examine Byzantine canon law from a "bird's eye view", examining the overall shape of the tradition and the patterns of its historical development, and considering what the basic contours of this development reveal about the legal presuppositions of the texts. In chapter two, we will turn to how the Byzantines themselves introduced their own tradition and set the parameters of its operation through various traditional prologues

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[54] See for example Plato *Laws* 630-1, 643e, 653b, 705d-6a; see also Gagarin 2000. Aristotle's *Politics* tends in much the same direction.

[55] This is something of a commonplace; see for example Calhoun 1944,58-63; Jones 1956,298-308, and more broadly Bederman 2000; Brasington 1994,227-228; Humfress 2007,9-28, 62-132 (and pp. 3, 25 for references to the older debate of the influence of rhetoric on Roman law; also, Humfress 1998,73-80); Winterbottom 1982. Ancient rhetoric, if far from suggesting a formalist legal science, is fully capable of providing a quasi-technical framework for the operation of legal argumentation, as even brief acquaintance with stasis theory makes plain (see especially Heath 1995).

[56] Heath 1995,76-77, 141-142, 294; Morgan 1998,234-235; Todd 2005; Yunis 2005,202-204.

[57] Cohen 1995; Gagarin 2005a,34-36; Lanni 2005; Sealey 1994,51-57; Todd 1993,58-60; Yunis 2005.

and prologue-like materials. In the third chapter we will turn to a careful reading of the Byzantine canons themselves. Here the literary orientation of the work will become most evident as our concern becomes directed not so much towards an analysis of the canons' substantive content, but to how the forms, styles and types of language employed in the canons can be read as revealing of legal beliefs. In the last chapter we will then consider the nature of the first Byzantine systematizations of the canons, and what these systems reveal about how the canons could be read, shaped, organized and otherwise jurisprudentially "digested". Finally, in the conclusion, we will consider how the various patterns and emphases that have arisen might suggest a coherent cultural-intellectual architecture of Byzantine canon law, and what this may mean for the problematics introduced above.

Each section of the study will proceed through a simple process of description, historical contextualization and consideration of how the observed phenomena might be read as indicative of particular legal concepts or orientations.

The determination of the "legal" – this last step – is, however, a hermeneutically tricky matter. Our primary concern is to allow the texts to themselves define their own sense of legality, and as such we will not attempt to analyze systematically the text according to any rigid legal-theoretical or anthropological model. Nevertheless, some type of pre-determined questions or criteria for identifying and examining "the legal" must be brought to the texts. Although we might like to think that one can explore the legal textures of the Byzantine canonical texts "on their own terms", such a phrase can only be understood as a shorthand for a dialectical process of challenging modern preconceptions and expectations against the evidence within the historical texts. We can therefore entertain no illusions about approaching these texts without certain preconceived legal problematics or categories. However, the hermeneutic crux of our method is simply that we allow the historical texts to challenge these preconceptions, and be prepared for surprises – our legal preconceptions must be employed in such a way as to allow points of difference to emerge, and to not simply set an agenda of conformance. In this it is particularly critical that we be quite open about what type of legal questions and criteria we are bringing to the texts.

The chief legal foil against which we are reading the Byzantine texts – as should already be apparent – is a composite construction of modern narratives, practices and perceptions that may be termed legal formalism, or perhaps better, positivist-

formalism.[58] This construction does not correspond to any real legal system, but is broadly descriptive of a set of practices and cultural ideals which have their immediate ancestors in 12th C western European readings of Roman law texts, and which have become characteristic of the "learned" and official law of most modern western legal systems (especially continental). Its contours should be familiar.[59] Law is conceived as an independent and abstract project or field of human (and academic) endeavour concerned with the application of a formal system of mostly written rules to a wide range of dispute and order-related factual situations. These rules are conceived as ideally clearly established and defined by a competent legislative authority, and are treated as – and are intended to be – a closed and coherent systematic whole.[60] Ideally the rules are as comprehensive as possible, even "gapless", and are meant to be able to address virtually any factual situation that may arise. To this end, the rules are often exceptionally lengthy and detailed, with many provisions, exceptions and qualifications – and there are very many of them. More importantly, the legal system (and it is thought of as a "system") is characterized by an advanced and sophisticated set of proprietary methods and techniques – a set of "secondary rules"[61] – that governs the application and use of the primary rules and that try to ensure that these rules can be applied as widely and consistently as possible. These rules can even generate new primary rules.

Consistency and fairness of rule-application is a chief value of this system, and is related to a central conviction that one can find a more or less "right" legal answer for any situation solely from the disciplined and predictable operation of legal principles and concepts (the "forms" of the law can themselves produce correct answers – thus "formalism"). In effect, the rules *themselves* can be made to "think through" any situation. Because of this, the system places great emphasis on internal logical coherence, and is exceptionally concerned about establishing clearly defined and precise definitions, concepts, and relationships between rules, and eliminating any

[58] A very wide range of meanings can be attached to both these terms in modern legal theory. See the comments of Posner 1993,9-26 (incl. n. 31); Wieacker 1952,342, and nn. 3, 5. Our usage is in its details proprietary and is defined by what follows. It conforms, nevertheless, to what I perceive to be a general disciplinary "folk usage" of formalism and positivism to refer to the main dynamics of modern professionalized legal culture in the western world.

[59] The following owes much to Berman 1983,7-10; Glenn 2007,118-152; Roberts 1979,17-29; Watson 1995; Weber 1925, 61-64; 224-255 as well as numerous other works on legal theory and modern legal culture, listed in the bibliography.

[60] This does not require an actual code; Anglo-American law treats both statutory and case law as functionally witnessing to a coherent set of legal principles and concepts.

[61] A concept borrowed here loosely from Hart 1961,89-96, who borrowed it loosely from Wittgenstein.

contradictions, repetitions, or irregularities. The system thus often seems to function like a "science", and the designation may even be welcomed. When the logical and consistent application of legal method and technique cannot find a proper legal answer judicial "discretion" must be invoked – but, it is held, hopefully very rarely and in a very controlled manner. It is much preferable for the rule-system itself to produce an answer than to depend upon the whimsy of a fallible human judge. Indeed, the controlling metaphor of the system is probably technological: law is idealized as functioning as a quasi-mathematical *mechanism* of legal doctrine in which rules may be impartially applied to different fact situations.[62] It is recognized that such a formalist rule-mechanism will not always produce an obviously just solution for every problem, but this is accepted as an unfortunate but necessary element of the system. Thus the critical distinction arises – and is accepted – between formal and substantive justice, that is, between a "legally" just solution (formally and procedurally correct) and a "really" just solution (according to the value judgments of a given observer or community, or various philosophical criteria). This can in turn encourage a certain amoralism in law's practice, where participants are expected to function not so much as truth-seekers as skilled manipulators of a kind of "rule game", defending "interests" in a strongly agonistic manner.

Not surprisingly, this type of legal system, a complex system of rules and rule-logic, is largely operated and developed by a professional caste of legal experts and academics. These in turn function in the context of proprietary legal professional and academic infrastructures. This professional caste tends to form a distinct class in society, with its own forms of education, its own career-paths, its own special qualifications, its own special professional language, its own special dress, and its own standards of conduct – its own "ethos".

The presence of a well-defined class of legal professionals is, however, only one aspect of an even broader and central motif: autonomy. Not only does law function as the domain of a clearly demarcated professional cadre, but law understands itself as a distinct field of human endeavour and study, separate from other fields and with its own language and special method of reasoning and thinking. It is, in particular, constantly concerned with self-differentiation from other types of normative systems and forms of social control. Especially characteristic is an ongoing preoccupation with distinguishing itself quite clearly from ethics/morality and politics (and in canon law, theology). An

[62] Justice's blindfold is a wonderful illustration of this. The *scale* is now determining justice.

extremely important aspect of this autonomous self-perception – and a critical aspect of its formalism *and* positivism – is the idea and ideal that it is able to function legitimately with as little recourse to these "outside" narratives and values as possible. It wishes to be as sealed as possible from outside interferences, bound instead by its well-defined legal rule-world.

Finally, law is highly susceptible to patterns of construction and reconstruction as legislators or legal professionals shape and reshape it to conform to changing policy goals or value decisions (this is the principal expression of the system's "positivism"). This may happen through a formal legislative process or through less dramatic philosophical or proprietary legal-academic discourses (a "jurisprudence", casuistic or deductive). In all cases the law is in this respect very "secular": it is very much a malleable human instrument or tool for the effecting of broader agendas or goals, whether these be the whim of a despot, the consequences of a natural law theory, a social policy, or a concern for greater systematic consistency. Provided that the correct formal procedures (formalism again) are followed, rules may thus be dismissed, replaced or modified quite easily. The law is thus typically always "progressing", "advancing", or "growing" – change, even profound change, is fairly easy.

This vision of the legal has long been recognized in both legal theory and legal anthropology as having no special claim as a source of universal categories to explore human law, nor even as embodying a particularly useful legal ideal.[63] Nevertheless, we employ it here because it continues to dominate in one way or other the legal thinking of the four disciplines enumerated above. More importantly it remains, even if weakened, the functional reality of modern western legal culture. Most lawyers, legislators and judges in the western world (indeed, in most of the world; western legal formalism is one of the world's greatest imperial success stories) continue to think of their work in terms not so far from those just described. Similarly, most citizens of western countries, despite frustrations and dissatisfactions, understand and expect the processes, ideals, values and struggles of this type of legal culture. It thus captures better than any other specific theoretical model the parameters and points of reference of our culture's *legal imagination*: our legal instincts and habits, the "cultural plot" of what law is about. It thus provides a heuristic backdrop of unparalleled richness and cultural "density" for

[63] As to not having any special claim on providing categories for human law, this is the essence of the– Gluckman-Bohannan debate in legal anthropology; see Donovan 2007,100-122. In legal philosophy legal formalism-positivism of the type described here is so dead as to have almost become the straw-man of legal wrongness, strongly contested by – to name a few – sociological jurisprudence, legal realism, pragmatism and critical law studies. See for example the comments of Stone 2004,166-167.

any study of a non-western, non-modern legal system aimed at ferreting out contrasts and similarities of legal-cultural belief. It is, in any case, unavoidable.

Aside from this general formalist-positivist foil, a number of more specific questions are also persistent in this study's examination of "the legal" in Byzantine canon law, even if they do not always emerge directly from the sources. The most prominent is the relationship between Byzantine canon law and contemporary Byzantine secular law. This is an issue that in different ways is important to all the disciplines mentioned above. Here our concern will be not only explicit theoretical articulations of this relationship (which are few in our texts, in any case), but also subtler textures of how the texts locate themselves in relation to the secular law through patterns of shared (or not) nomenclature, diction, patterns of thought, compositional forms, genres, and images.

Comparison with western canonical tradition of the first millennium is also a recurring theme, although only sporadically. This is both inevitable and useful given the western orientation of much modern canon law historiography. We will also very occasionally (mostly in chapter one) look east, to the Syrian and other "oriental" Christian worlds, considering ways in which Christian canon law can be read as a unified legal story. In this we will be attempting to take a few modest steps towards breaking the parochialism of much modern canon law historiography.

Finally, this study will be frequently informed, albeit usually indirectly, by a wide array of categories and questions derived from modern legal sociology, comparative law, law and literature studies, and, above all, legal anthropology.[64] This literature has proven to be a fertile, and indeed indispensable, source of challenging questions and problems: do legal systems need formal norms? do the logical consistency and interrelationship of norms need to be privileged? are "facts" important in adjudication? must legislation emerge from a clear positive authority? must law be clearly delimited from other types of social regulation? The importance of this literature is perhaps primarily to awaken one from any legal-dogmatic slumbering: no other literature is so useful for challenging one to take into account the enormous possible varieties of human legal experience, and so deeply illuminating of one's own legal presuppositions. This study, however, in no way pretends to be a work of legal

[64] Todd 1993,18-29 was a key inspiration in my investigation of legal anthropology. Among the works consulted include the introductory works of Donovan 2007, Roberts 1979, and Rouland 1988 and the studies of Bohannan 1957, Diamond 1950, Gluckman 1955, Hoebel 1954, Hoebel and Llewellyn 1941, Maine 1861, Malinowski 1926 and Pospisil 1971. In the other fields mentioned important resources have included Glenn 2007, Ong 1982, Posner 2009, Weber 1925, Ziolkowski 1997.

anthropology or comparative law, just as it is not a work of legal theory – we are, to borrow a phrase from Richard Posner, "consumers", not "producers" of these fields.[65] Their questions and categories may nevertheless be felt constantly assisting us in the recognition and articulation of many of the legal textures and patterns we encounter.

A few limitations have been imposed upon this study. The first is chronological. The dates 381 to 883 have been chosen because the first corresponds (at least roughly) to the adoption of the so-called "Antiochian" corpus by the church of the recently-triumphant Nicene orthodoxy, and therefore to the emergence of the collection of texts that will become the core of the Byzantine canonical tradition. The second marks the completion of the so-called Photian recension of the *Collection in Fourteen Titles*, which, in retrospect, marked the completion of the core Byzantine canonical corpus. These dates therefore encompass what may be fairly considered the central period of development of the Byzantine canonical tradition, i.e. the time during which the texts and text-structures were produced that even to this day are considered the heart of the entire Byzantino-Orthodox canonical tradition. These dates are, however, symbolic; material outside of these dates will be occasionally considered to illustrate broader themes and patterns.

The texts from this period to be examined have also been limited very narrowly to the texts that emerge as the central corpus structures of the Byzantine canonical tradition. The scope, definition, and development of these "central corpus structures" will be examined in detail in chapter one, but suffice to say they includes all of the canonical sources of the 883 recension of the *Collection in Fourteen Titles*, the introductory and rubrical structures of the two extant Byzantine systematic collections from this period (the *Collection in Fifty Titles* and the *Collection in Fourteen Titles*), and a number of other smaller texts from this period typically found in the manuscripts. These texts are not exhaustive of the canonical material of this period, by they do constitute its most important and prominent elements.

Although this work is primarily conceived as a close and "closed" historical-cultural reading of these canonical texts, its topic can only be meaningfully pursued with some attention to the historical contexts for the structures and patterns observed. Because the potential contexts for illuminating patterns of legal belief and imagination are enormous, these too have been restricted mostly to a pool of texts from this period that might be considered primary witnesses and influences on the Byzantine canonical

[65] Posner 1993,xii.

texts *as a formal corpus structure*. This pool is still very large, and includes virtually all of the secular legal collections of this period, as well as a wide variety of other texts that form the canons' most immediate and obvious contexts: the Apostolic church-order collections, literary/philosophical treatments of law, and Scriptural law-code-like texts. Unfortunately, the length restrictions of the modern doctorate have precluded systematic comparison with these texts, but the most significant parallels and differences will be noted.

Despite these limitations, the scope of this work remains extremely broad, encompassing over five centuries of canonical material. This breadth is perhaps disconcerting. However, the broad scope of this study is the result of a firm methodological conviction that the fundamental contours of legal belief – our principal topic – can only be convincing traced in categories, structures, and shapes of the traditional texts as they develop over the cultural *longue durée*. It is only in the cumulative coherence of how the corpus takes shapes (chapter one), how the tradition frames its own endeavours (chapter two), how the central texts of the tradition themselves "talk" about their legal world (chapter three), and how the tradition organizes and arranges itself (chapter four) that the nature of law and legality in the canonical collections truly begins to emerge with any clarity. More specific or impressionistic anecdotal treatments do not easily lend themselves to basic questions of how the system as a whole was perceived – and can even evade the challenge of considering the cultural whole at all.

Nevertheless, this broad scope has required certain economies. To provide for sufficient analysis of the Byzantine canonical material itself, comparisons and contextualizations have had to be kept restrained – and too often relegated to the footnotes or appendices. A number of translations, additional examples or data sets, and important, but supplementary discussions or illustrations, have also been appendicized. Finally, substantiation, particularly in the third and fourth chapters, has generally been kept representative, not exhaustive.

One other, more important caveat must also be made: even as an exploration into Byzantine church-legal culture, this work can only be considered one piece of a much larger project. It demands at least two companion studies. First, the field desperately needs a much more thorough study of Greek patristic thinking on law and legality than currently exists, and this must include work on the influence of Roman legal thinking on

Greek patristics (Latin material has been much better served in both areas).[66] Such a study must examine not only explicit expression of theory, but also track the use of legal metaphors, images and language, and consider broader legal symbolism and iconology (and even architecture). Second, and perhaps more importantly, the field requires a thorough cultural-legal analysis of texts conveying forensic practice, similar to that performed by Dieter Simon on the Πεῖρα. Important texts would include conciliar *acta*, other record of trials (e.g. of Maximus the Confessor), and even epistolary exchanges on church-legal matters (e.g. between Photius and Nicholas I). For our purposes, these texts need to be examined not so much for what they may or may not reveal about what "really happened" socially or politically, but for the legal assumptions and values they assume and promote.

[66] For example, Biondi 1952, Gaudemet 1957,163-176; 1958,467-483. See the treatment of this question, with many further references, in Humfress 2007,147-152. On the Greek fathers, see the very brief treatment in Stiegler 1958,97-101, and now Troianos 1992.

CHAPTER 1: THE SHAPE OF THE LAW

The basic shape of the tradition as a textual artifact – its constituent texts and their structures, and the patterns and dynamics of their formation and growth – reveal much about the nature of Byzantine canon-legal culture. Preliminary even to the conscious and explicit introduction and framing of the canon-legal texts, these aspects of the canonical tradition constitute the most basic way in which Byzantine canon law, as a normative system, presents itself to us and sets its own fundamental parameters.

A. A preliminary problem: codicology

This question of the "shape" of the tradition immediately raises the problem of how the tradition was physically present and encountered by contemporaries, i.e. publication forms, size, circulation, typical manuscript contents, and text layouts. In other words, it immediately raises the problem of Byzantine canon-legal codicology.

Unfortunately, a codicological description and analysis of Byzantine canon law has never been performed. In fact, it is surprisingly difficult to find even basic codicological information in the modern literature: the physical shape of the tradition has never been a primary focus of interest. This neglect is so dissonant with our own priorities that it requires some explanation.

The basic problem is disciplinary: cultural history simply does not think codicologically. Rarely does a discussion of Byzantine theology, for example, start with the question of what a typical Byzantine "theological manuscript" looked like, what it contained, and how it was structured – or even if it existed. Instead, one tends to begin and end analyses with individual texts, extracted from the manuscripts, and possibly reconstructed. This tendency is driven by two major disciplinary trends, both of which are broadly problematic for our study.

First, modern historicism has tended to treat texts as anchored so firmly in original contexts that one can easily ignore their later historical relationships with each other and how, over time, texts become incorporated into larger cultural-intellectual wholes. One instead focuses on discrete text, at one discrete moment.

Second, and even more critically, an atomistic approach to ancient texts is strongly reinforced by the ideal of the modern critical edition. This ideal – as evident in all the major primary source series – has tended to encourage the isolation and "disentanglement" of select individual texts from manuscript contexts. As a result,

instead of reading whole manuscripts, and individual texts within the literal "con-texts" of the manuscripts, scholars tend to read, via the critical apparatus, single texts *across* different manuscripts. The disposition of the relevant texts in the manuscripts – how often they are found, where they are found, next to what and how often, in what form, with what breaks and with what scholia – is distinctly side-lined. The question can hardly even be asked how these factors might inform our understanding of how the texts were read and how the texts, in their manuscript setting, constituted (or did not constitute) a particular thought-world.

This discouraging of interest in how texts were physically synthesized and related to one other in the manuscripts – and by extension, in the cultural tradition itself – has encouraged re-synthesizing and re-ordering these texts in relation to each other in ways that may have little resonance with the priorities, interests or textures of the historical cultural tradition itself. A classic example of such a re-synthesis would be a "history of ideas" survey of ancient theology or philosophy that systematically traces the development of various discrete concepts and ideas through a patchwork juxtaposition of texts with little attention to whether the texts in question were ever much read at all, whether they were associated with each other, and whether they lend themselves to such systematic conceptual presentation in the first place. In canon law, the 19th C Orthodox manual tradition represents such a re-synthesis. The canonical manuals systematically extract rule content from the traditional texts and reorganize them under doctrinal headings derived from western canon and civil law. The historical shape of the tradition is important only for clarifying and purifying the individual "sources" of this reconstruction – not for the architecture of the system as a whole.

Further problems are presented by the extreme interest of critical editions in restoring only "original" texts – texts as found at one point in time, their origin.[1] This again distracts attention from how texts develop over time, and thus how the texts were related to each other and digested over time – critical issues for cultural history. The effect of these editions is to present not what ancient readers were actually reading – the critical starting point of cultural-historical analysis – but what modern scholars think ancient readers *should* have been reading. The entire ancient textual tradition thus becomes a huge montage of reconstructed, disembodied semi-hypothetical "originals",

[1] For broader critique of the concept of an "original" text, and the related ideas of "original meaning" see, for example, Epp 1999; Louth 1983,104-109; McGann 1983.

which may bear very little resemblance to what most, or even any, exemplars of the text actually look like.[2]

This concern for originals also promotes a text-editing culture which sees variations and accretions as a "problem" that must be, and can be, penetrated, excised and dismissed in order to get to the "real" text. Sometimes this real text might not even be an original, but simply those core elements of a text which are of particular interest of the editor. In Byzantine canon law, Périclès-Pierre Joannou's edition of the canons, at present the best critical edition, provides an example of this tendency.[3] It first disembodies or "cleans up" the tradition, stripping the canons of their traditional manuscript structures, appendices, indices, and scholia.[4] It then goes on to include a source that is not found in any Byzantine canonical manuscripts,[5] adds numerous rubrical headings not commonly encountered,[6] and boldly re-arranges the sources such that the Apostolic canons are found prefaced to the "patristic" material – a disposition never encountered in the tradition, and quite contrary to its spirit. The result is something that is neither particularly close to anything in the manuscripts, nor, indeed, to any "original". These actions make sense in light of Joannou's primary interest – providing modern Catholic codifiers with the most important Byzantine canonical sources – but they do not result in a particularly useful window onto the Byzantine canonical tradition itself.

In this respect, the older, and often inaccurate, edition of J.B. Pitra is superior.[7] Although the overall form of the edition does not attempt to approximate any Byzantine manuscript, Pitra was careful to include the standard "framing" texts of the manuscripts (prologues, systematic indices), some of the introductory apostolic materials, some appendix material, and some scholia.[8] The much more accurate editions of Beneshevich are also more useful and reliable inasmuch as they attempt to convey the whole of specific "originals": the original version of the *Coll50* and the "Tarasian

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[2] An excellent example is Scripture: it can come as a surprise to many scholars that even the New Testament only rarely forms a single physical book in the Greek manuscript tradition, and that the Catholic epistles almost always precede the Pauline. Metzger 1981,54-56; Parker 2008,70-81.
[3] Turner 1899 is another example; the concern to compare texts has made it difficult to determine exactly what any one collection looks like.
[4] Even one set of "prologue" material, for Constantinople, is missing; see Appendix B (2).
[5] Constantinople 869 in *Fonti* 1.1.289-342. Joannou carefully notes, of course, that this is an addition.
[6] See Appendix B (2).
[7] Criticism of Pitra's text is widespread: see Funk 1905,1.xxiii; *Sources* Introduction; Stolte 1998a,184; and above all *Sbornik* 24-25 and *Sin* 20-21, *et passim.* Even casual use of the text will reveal many small errors.
[8] Beneshevich is also quite critical of Pitra's edition of the scholia (2.642-655): "крайне неудовлетворительно" (*Sin* 250-251).

recension" of the *Coll14*.[9] Beneshevich is also concerned to convey scholia, albeit separated from the main body of the texts.[10] The best representative of the shape and texture of the tradition is, however, Rhalles-Potles, the least critical of the major modern editions. It roughly approximates the typical order and content of a fairly full late Byzantine manuscript, with prologues, systematic index, full corpus with commentators, and appendix materials – although without scholia.[11]

The modern text-critical emphasis on the original, or even specific recensions, not only results in texts that do not necessarily look much like typical examples, but also entails the ingress of subtler assumptions of printed-text culture. Print-cultures tend to think of texts first and foremost in terms of discrete recensions, on the model of separate editions and printings of modern publishing.[12] This encourages us to think about change in texts in terms of distinct moments of "official" publication, and thus in terms of very discrete, intentional stages of development. Manuscripts, however, suggest a much more gradual and continual mechanism of textual change: each manuscript copying is in a sense a new recension or a new edition, and variation is easily found – and tolerated – manuscript-to-manuscript. Texts thus emerge as much more fluid, "living" phenomena than in printed-text cultures, subject to constant change over time. This demands attention, then, not simply to specific moments in the text's history, points of dramatic change, but also to slow and gradual *patterns* and *tendencies* in textual shaping over time. Further, to appreciate the intellectual-cultural world of these texts, the values and characteristics of print-cultures, such as absolute precision, accuracy, identity of texts, attention to detail, and intentional logical change, must not distract from appreciating the dynamics of manuscript cultures: the gradual, the graded, the general, the similar, the subtle, the unconscious. This sensitivity is particularly critical in legal studies, where many of the values of modern legal culture (precision, strict definition, categorical application, logical systematization, newer texts immediately abrogating the old) are closely intertwined with those of modern print-culture.[13] Doing law in a manuscript culture is a very different proposition from doing law in a print culture.

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[9] *Syn* and *Kormchaya*.
[10] *Syn* 157-190; *Sin* 250-268; *Sbornik* 145-149; *Sbornik* (Prilozhenie) 3-80.
[11] This faithfulness to the manuscripts accounts for its continued dominance in Orthodox canon law studies. See Appendix A (1) for details.
[12] For what follows, see especially Parker 1987, also Eggert 1991, Jeffries 2008,92, Ong 1982 and Stolte 1998a,187 (on the "living" nature of the nomocanonical recensions).
[13] Changes in writing technology have not infrequently been connected with changes in legal culture. See Appendix A (2).

All of these codicological problems have not been entirely neglected in the modern disciplines of Byzantine law and Orthodox canon law, but they have not drawn much attention.[14] The chief result of this is that the study of Byzantine canon law, like the study of western canon law, tends to be centered around source surveys that take as their central and fundamental narrative unit the individual source or collection, extracted and reconstructed out of the manuscripts, understood as constituting discrete published wholes, and analyzed almost exclusively in terms of original compositional context (author, place and date), discrete recensional stages, and narrowly-conceived source relationships with one another, i.e. the derivation of individual constituent texts.[15] Pieces of the manuscripts are thus privileged over wholes, compositional practices over reception and editing, and diversity over continuity. Broader morphological and substantive patterns across the manuscripts and collections and how these patterns suggest a broader cultural-legal world – our very concern in this chapter – tend not to be considered at all. The "shape" of the tradition, as encountered by most of its historical readers, becomes very difficult to discern.

Unfortunately, redressing these problems is not easy. Codicological analysis of Byzantine canon law also faces considerable practical challenges.

The first problem, for our period, is simple and glaring: the extant manuscripts all date from the 9th C or later. The very earliest Greek canon law manuscript is usually dated to the early 9th C.[16] This is at precisely the end of our period of examination. We thus have no direct codicological window onto most of our period of interest: we have no physical witnesses to the shape of the tradition.

This problem is probably less serious than it first appears. One of the fundamental characteristics of the Byzantine canonical tradition, as we will see, is its extreme conservatism and stability. Combining Beneshevich's careful text-archeological reconstructions of pre-9th C recensions of the *Coll14* (and to a lesser extent, the *Coll50*), pre-9th C Latin and Syriac witnesses which often reflect older Greek originals, external textual witnesses, and various processes of extrapolation, it is possible, as we will see, to make very good guesses about the basic form of Byzantine canon law texts prior to the 9th C. At the very least, one can extrapolate back to fundamental patterns and dynamics of the manuscript tradition, if not specific forms.

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[14] The main exception is Burgmann 2002.

[15] So, for example, *Delineatio* and *Peges* in the east; Gaudemet 1985, Maassen 1871, Reynolds 1986, Stickler 1950 in the west.

[16] Patmos 172. Stolte, however, has reported finding an early 8th C, possibly late 7th C, fragmentary palimpsest of the *Coll14*; it is not yet published. Stolte 2002,194 n. 16

More problematic, in fact, is simply the practical state of affairs of modern Byzantine legal codicology. Thanks to the efforts of the research group "Edition und Bearbeitung byzantinischer Rechtsquellen", founded in 1974 by D. Simon, virtually every known Byzantine legal manuscript, secular and ecclesiastical (at least until c. 1600, but later ones have also been included; in total ~1000 manuscripts), has now been microfilmed and gathered at the Max-Planck-Institut für europäische Rechtsgeschichte in Frankfurt.[17] An excellent and detailed manuscript description project is underway. But the volume on canon law has yet to be completed, and as a result it is still difficult to ascertain with absolute certainty even fairly basic information about codicological content (i.e. distribution of collections, predominate forms of collections, etc). Until such time as this volume is completed, we must rely on a patchwork of older, sometimes unsatisfactory and incomplete catalogues, editions, descriptions and source-histories – and, of course, a sampling of the manuscript themselves.[18] This data is already sufficient to allow at least basic conclusions about the major contours of the tradition, our primary concern here; but many points of detail must remain tentative.

B. The tradition takes shape: a survey of the textual history of Byzantine canon law

Although much text-work remains to be done, considerable clarity and consensus now exists on the basic narrative of the development of the sources of the Byzantine canonical tradition.[19]

As is well known, the Byzantine – indeed, Christian – canonical tradition does not emerge as a coherent and distinct textual whole until well into the fourth century. At this time, earlier and more fluid patterns of written and customary regulation begin to congeal around the increasingly regular institution of conciliar legislation. Local but ever more formal collections of written conciliar regulations (starting to be termed

[17] For a description of the project, Burgmann et al. 1995,vii-xvii. The project is now formally based in the University of Göttingen.
[18] See Appendix A (3) for an overview of the manuscript tradition, and of manuscripts examined.
[19] Byzantine law is in fact awash with source surveys, a situation that highlights the lack of any other type of modern history of Byzantine law since Zachariä von Lingenthal 1892 – whether traditional legal-doctrinal/institutional or social-historical. On this see Fögen 1987,137; Kazhdan 1989; Simon 2005; Stolte 2005. Of the source surveys, *Peges* and *Delineatio* treat both secular and ecclesial law; Beck 1977,140-147, 422-425, 598-601, 655-662, 786-789, is now outdated, but still useful in its level of detail and as a guide to older editions; it treats exclusively church law. Pieler 1978 is restricted to secular material, but remains essential. For the sources of canon law, *Sources* is now the most up-to-date, containing extensive references to early literature; *Historike* is also essential. Of the older surveys, Mortreuil 1843, although very much out of date, may still be valuably consulted because of his attention to the manuscripts; Zachariä von Lingenthal 1839 remains surprisingly useful. Other more specific, but fundamental, discussions of the sources of Byzantine canon law texts include Schwartz 1936a, *Sbornik*, *Sin* and Schminck 1998.

κανόνες by the end of the 4th C) start to take prominent place alongside of the older customary and Apostolic church order traditions of regulation.[20]

Eduard Schwartz has shown that it is likely that sometime in the mid-fourth century a small corpus of local conciliar material from Asia Minor, presumably of a type not uncommon elsewhere, began to rise to prominence.[21] Through a careful examination of the oldest Latin and Syriac material – the early stages of this process have left few traces in the Greek tradition itself – Schwartz was able to piece together a reasonably convincing narrative of this development. It seems that sometime between 360-378, perhaps under the direction of the Homoean Euzoius of Antioch (361-376), a small collection, probably Pontic in origin, was adopted in Antioch. It seems to have included originally Ancyra (314) and Neocaesarea (319), perhaps Gangra (c. 340?), eventually Antioch (c. 330, traditionally considered Antioch ἐν ἐγκαινίοις 341, even in the early 5th C)[22] and probably Laodicea (date uncertain; before 380).[23]

This early "Antiochean corpus" seems to have been shaped primarily in an Arian milieu. With the accession of the Nicene Theodosius in 379, however, this collection was apparently rapidly adopted by the Nicene party, probably first by Meletius of Antioch, who was restored to his see in this same year. At this time – perhaps not so long before or after *Cunctos populos* (February 380), at any rate by 381 – the canons of Nicaea were added to the head of corpus. This move dramatically violated the chronological ordering of the sources that had prevailed hitherto (the councils of Ancyra and Neocaesarea were both known to predate Nicaea). Echoes of this unusual move may be found in special headings extant in Greek, Latin and Syriac traditions explicitly explaining this aberration.[24] Its effect was unmistakable: the Arian "Antiochian corpus" had become the "Nicene corpus".

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[20] I bypass here the many complex issues surrounding the origin of formal church regulations. For good recent discussions, see Hess 2002, L'Huillier 1998, Ohme 1998. Schwartz 1910, 1911, 1936a remain foundational.

[21] Schwartz' conclusions are mostly found in Schwartz 1936 and1936b, with further references. Valuable recent discussions of this early corpus may be found in *Delineatio* 24-30, *Historike* 21-32, L'Huillier 1976, Selb 1967.

[22] L'Huillier 1976,59 and *Sources* Antioch, following Schwartz and Bardy; *contra*, *Historike* 356-366 (and also *Fonti* 1.2.100).

[23] On the date, *Sources* Laodicea; but its presence in the earliest collections, see *Historike* 23-25, L'Huillier 1976,61.

[24] Each version typically explains that Nicaea is placed before Ancyra or Neocaesarea because of its preeminent authority. For the Latin and Syrian see most conveniently Schwartz 1976,174-175 (also Turner 1899,2.1.19, 48-49, 116-117; Selb 1967,377-378); for the Greek, see *Kormchaya* 229,238; cf. also the later Greek scholion to the *Coll14*, *RP* 1.11-12, which again feels obliged to explain the unusual pre-positioning of Nicaea as διὰ τὸ τῆς τιμῆς ἐξαίρετον.

The production of this Nicene corpus (I prefer to restrict "Antiochian corpus" to the pre-Nicene version of this body) would prove to be a definitive, indeed tectonic moment in the development of Christian canon law. Within a century or so this corpus would constitute the undisputed canonical core of virtually the entire imperial church: Latin, Greek, and Syrian. Its success must be attributable to a tacit understanding that just as the Nicene creed was the touchstone of Orthodoxy for all later doctrine, so the Nicene corpus – probably originally prefaced by the Nicene creed – was the standard for church order.[25] It became, in effect, the official Nicene imperial canon law book for the official Nicene imperial church. It is the first consistent and regular "physical" textual whole in the tradition.

This corpus seems to have passed into the Latin west very rapidly, and no less than three times in the 5th-early 6th C: first with the so-called Isidorian translation (a version of which is commonly referred to as the Freising-Würzburg collection), perhaps the very collection sent west to Africa during the Apiarian affair (419; before 451 in any case); second, with the *Prisca* collection in Rome (c. 451-500); third, and definitively, with the translations of Dionysius, also in Rome (c. 500, perhaps as late as 523).[26] Through these three versions – and above all the *Dionysiana*, the most complete and accurate[27] – the Nicene corpus will go on to form the basic core of most major western collections, and many minor ones, for the next four or five centuries.[28]

The movement of the Nicene corpus into the Syrian east was likewise rapid and complete.[29] Already in 399 (or perhaps 410) it seems to have been translated through to Laodicea for the Persian church, and these "western canons" are formally listed and confirmed at the council of Jahb Allāhā in Seleukia-Ctesiphon 419. The corpus is there

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[25] On the presence of the Nicene creed, see chapter 2.A.1. Schwartz was aware of the symbolic significance of the Nicene prefacing of the Antiochean corpus (e.g. 1936b,200), but does not consider its role in the broader – and extraordinary – spread of the collection; see also Ohme 1998,526-542.

[26] This is a simplification of what seems to have been a much more complex process of westward transmission; see especially Hefele-Leclercq 1938,3.1150-1200 for a detailed discussion, mostly building on Maassen 1871. For this three-fold transmission see Gaudemet 1985,77-79; 130-137, with references to earlier literature. Schwartz 1936b remains fundamental for the first collection, in particular.

[27] On Dionysius and the *Dionysiana* see now especially Firey 2008 and Gallagher 2002,9-18. Three redactions of the councils are known: "Dionysius I" (ed. Strewe 1931); "Dionysius II" (ed. Voellus and Justel 1661,1.101-174 = *PL* 67:139-228); the third, "Dionysius III" is known only from its surviving preface (see Somerville and Brasington 1998,49).

[28] Especially the *Dionysiana*, Cresconius' *Concordia* (a reorganized Dionysius II), the *Hispana*, the *Dionysiana-Hadriana*, and the so-called *Isidor Mercator collection*. It is also the underlying core structure of the 6th C *Brevatio canonum* of Fulgentius Ferrandus, the 6th C *Capitula* of Martin of Braga and many other smaller handbook-like collections. On all of these, see Gaudemet 1985, but especially Maassen 1871 and his concept of "general collections", which he defined precisely as containing this Greek core (Maassen 420-421; collections described 422-797). Note, however, that many of Maassen's systematic collections (798-900) also often exhibit this core structure as an identifiable "backbone" or framework.

[29] Selb 1967,371-383; Selb 1981,58-81, 83-94, 97-110; 1989,86-173, esp. at 98-109, 139-149.

significantly described as the "laws that have been drawn up by the blessed fathers and bishops for the catholic church in the entire Roman empire"[30]: the universality of this "imperial" core is explicitly recognized. These canons were preserved even after the separation of the Persian Catholicosate from Antioch in 423, and this corpus, expanded to include Constantinople and Chalcedon, is attested at the synod under Mār Abā (539/40-552), and regularly thereafter.

The west Syrian tradition would also adopt (or maintain) the imperial corpus. Its tradition is more complex, evincing at least two major transmissions.[31] One tradition, exercising considerable influence on later material, is represented by a second translation made c. 500 in Hierapolis (Mabbūg), probably originally in Melkite circles.[32] This translation included the Nicene corpus through Chalcedon. Other manuscripts count the synodal canons through Ephesus, with Chalcedon listed later after a series of patristic canons. This ordering may date to a translation attested in 687. Other manuscripts show a number of other variants. In all cases, however, the basic Nicene structure at least through Constantinople is evident, dominating the west Syrian *Synodika* as surely as the east Syrian.

Parallel processes of reception of the Nicene corpus will also be evident in other Oriental traditions, where the same imperial core in easily evident in the major collections of the Alexandrian-Coptic, Armenian, and Ethiopic traditions (and later in the Georgian tradition and Melkite Arab traditions, receiving Byzantine collections).[33]

In the Greek east itself, the reception of this Nicene corpus was rapid and complete – so much so, in fact, that the history of Byzantine canon law can quite reasonably be cast as the history of the expansion and development of this one collection. Already at Chalcedon (451), a formal imperial council, it is cited as a matter of course.[34] Thirty years after the Persian bishops in Seleukia-Ctesiphon had recognized that this collection was the "laws for the catholic church in the whole Roman empire" the Nicene corpus was clearly sufficiently established as *the* collection of an

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[30] Selb 1967, citation at 374, without further reference, translated by Selb.
[31] Selb 1989,103-110, 140-149.
[32] Selb 1981,89. Edition: Schulthess 1908.
[33] For a sense of the diffusion of the texts, and editions, see *Clavis* 8000, 8501, 8504, 8513-8527, 8536, 8554, 8570, 8600, 8603, 8604, 8607, 8717, 9008. For the Armenian tradition, see now Mardirossian 2004; for the Coptic tradition, W. Riedel, *Die Kirchenrechtsquellen des Patriarchats Alexandrien*, Leipzig 1900 (unavailable for my consultation); for the Arabic literature Graf 1944,1.556-621. For other oriental traditions, although out of date and in many ways unsatisfactory, Sacra Congregazione Orientale,1936. Now also Morolli 2000, 2000a, 2000b; Gallagher 2002,186-227.
[34] ACO 2.1.3.48, 60, 95-96, 100-101,107; cf. also ACO 2.5.51. Citations from L'Huiller 1976,54, and *Historike* 21-24.

imperial council. Chalcedon 1 thus confirms this collection: "We have judged it right that the canons set forth by the holy fathers in each synod until now are in force." (Τοὺς παρὰ τῶν ἁγίων πατέρων καθ᾽ ἑκάστην σύνοδον ἄχρι τοῦ νῦν ἐκτεθέντας κανόνας κρατεῖν ἐδικαιώσαμεν.) In the older literature this canon is sometimes thought not to be approving the corpus as a clearly demarcated written body, but the basic norms that it embodies, or conciliar canons generally.[35] Today, however, there is broad consensus that the regular citation of the Nicene corpus in Chalcedon itself and the later absolute dominance of this corpus, especially in the east, make this unlikely.[36] The lack of specificity in this canon simply represents the well-established nature of this Nicene corpus: everyone knows what "the canons" are.

Of course this Nicene corpus could not have entirely supplanted other local collections and traditions immediately or completely, even in the Greek east. Certainly other local traditions existed, and presumably continued to exist alongside the imperial corpus for some time. Within the later Byzantine corpus itself traces of these earlier local traditions may be detected. The Apostolic canons – and of course the Apostolic Constitutions from which they were extracted – were likely a local Antiochian collection of the late 4th C, which themselves seem to have taken into account earlier conciliar legislation.[37] The canons of Basil and Gregory of Nyssa undoubtedly reflect local Cappadocian traditions. It is suspected that the large number of Alexandrian patristic sources in the later Greek corpus originally were part of a local Alexandrian decretal collection.[38] Indeed, in the end, the later Byzantine corpus may in fact be considered a collection of local traditions: Asian, Antiochian, Alexandrian and Constantinopolitan (and eventually African material). One manuscript also contains traces of a small local collection, tacked on to the normal sources, evidence no doubt of continuing canonical diversity.[39] Other variants in the oriental collections, such as the frequent additions to Nicaea,[40] also point to earlier canonical variety, probably representing Greek originals.

Despite this early diversity, the general movement of the eastern tradition, as already evident at Chalcedon, was unmistakably towards and around *one* corpus, the Nicene corpus, and its later expanded versions: it is the basic, universal, uniform set of

[35] See van Hove 1945,144 n. 3.
[36] So *Historike* 25; L'Huillier 1976,55-56; Selb 1981,84; 1989,140; *Sources* Chalcedon.
[37] Metzger 1985,1.14-62; Schwartz 1936a,199-200; Steimer 1992,87-88; *Sources* Apostolic Canons.
[38] For example, de Clercq 1937,1172.
[39] The famous "Canonicon" of Palladius in Patmos 172. See *Sbornik* 235-240; Schwartz 1936a,182-186; *Sources* Basil; Turner 1913.
[40] On these canons, see for example Graf 1944,1.586-590; Selb 1981,100-1101; also *Sources* Nicaea.

canons of the entire empire. In this respect it is telling that one has to engage in considerable textual archeology to detect signs of earlier diversity in the Greek material itself. Even the pre-Nicene existence of the Antiochian corpus had to be uncovered by Schwartz using archaic Latin and Syrian traditions, preserving, in effect, memories from around the periphery of the empire. The Greek tradition itself tends to present a picture of uniformity and homogeneity.

The corpus used by Chalcedon was continuously numbered. No Greek exemplar of this type is extant. Indeed, despite references in the *acta* of Chalcedon to this numbering system, it seems to have passed out of all memory in Byzantium by the 9th C.[41] This numbering system does survive complete in Latin and Syrian witnesses, however, and likely dates from Meletius' Nicene appropriation.[42] Variations in this system indicate that the text was early on expanded at least twice, first with the synodikon of Constantinople 381 (i.e. canons 1-4, outside of the continuous numbering in the collection used at Chalcedon, and in the Isidoriana; also Constantinople is absent in the 419 Persian listing)[43], and then with the 27 canons of Chalcedon (outside of the continuous numbering in Dionysius II (c. 500), but inside in London BL Syr. 14528 (500-501)).[44] After the addition of Nicaea itself, these are the first indications of the tradition beginning to grow by "piling" of newer sources on top of the old as one ever-increasing corpus structure. As already evident, these "updates" seem to have passed into the west and east very quickly.

After the Chalcedonian canons were added, the corpus began to develop in slightly different directions across the Christian world. The dynamic, however, was everywhere the same: the gradual expansion of this core Nicene corpus by the addition of later, often more "local"[45], but sometimes more general, material.

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[41] ACO 2.1.3.48 (canons "95" and "96" = Antioch 4, 5), 101-101 (canons "83" and "84" = Antioch 16, 17). Another reference may be found in a later letter dating to 457-458, ACO 2.5.51 (canon "83" again). Photius is famously confused by a reference to Constantinople 2 as "canon 166" in a 6th C letter. (*Bibliotheca* 228; reference from Schwartz 1936a,159-160). See also *Historike* 31 n.2.

[42] L'Huillier 1976,60.

[43] See the useful listings in *Historike* 23-25, as well as the description of the Isidoriana in Gaudemet 1985,77. On the absence of Constantinople in the Persian recension of 419, Selb 1981,88-89.

[44] *Historike*, ibid. Cf. also Schwartz 1910,200-201on London BL Syr. 14526 and its omission of Chalcedon in the systematic index.

[45] We use the term "local" as a descriptive convenience for materials that do not pass out of their place of origin. These materials, which will include papal decretals in the west, and later Greek and Syrian councils and fathers in the east, were not necessarily understood as of "local" significance by their authors or collectors!

In the east, conciliar legislation shut down in the empire following Chalcedon, not to be restarted for almost two hundred and fifty years, at the council in Trullo 692.[46] The eastern corpus nevertheless continued to expand, but now through processes of consolidation and reception of earlier material. The chief agents – or perhaps witnesses – of this expansion seem to have been new "systematic" editions of the Nicene corpus that begin to appear at the beginning of the 6th C, perhaps in connection with Justinian's secular codification (528-534).[47] These editions of the canons are prototypically some version of the expanded Nicene corpus proceeded by a thematically arranged subject index (a "systematic index") of the canons. In the manuscripts, and the reconstructed earlier recensions, they tend to the following form:[48]

PROLOGUE(S) + THEMATIC INDEX + CORPUS + APPENDICES

The prologues will be discussed next chapter; they can vary in number, and sometimes prologues from different collections are "stacked" closely together.[49]

The "thematic index" is a series of individually numbered topics, usually called τίτλοι and/or κεφάλαια in Greek, with references to relevant canons.

The "corpus" may be in either systematic form – in which case the entire thematic index is repeated and instead of simple references the full text of the canons is now written – or in straight corpus form, i.e. the texts written out in their traditional source order, without any thematic headings. The *Collection in 50 Titles* (*Coll50*) is prototypically in the former form, the *Collection in 14 Titles* (*Coll14*) in the latter, but the reality of the manuscripts is more complex, as we will note in chapter four.

The "appendices" are a more fluid concept, still not thoroughly researched, particularly in the canonical collections, but a well-recognized phenomenon of Byzantine legal manuscripts.[50] It is thought, as we will see, that most Byzantine canonical collections were originally composed with at least an appendix of civil ecclesiastical legislation. In the manuscripts, these appendix sections can become quite

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[46] Not surprisingly a similar silence falls over the imperial west, i.e. in Italy and Africa, both in the tailing off of papal decretal production (see Gaudemet 1985,95-96), and in the lack of local councils. The last contrasts with the explosion of conciliar activity during this period outside of the empire in Gaul, Spain and Persia. Gaudemet 1985,96-121; Selb 1981,61-62,111-114,165-170.

[47] For these collections generally, see especially *Sbornik* and *Sin* as well as the recent surveys in *Delineatio* 51-54, 60-62, 66-70; 87-89; *Historike* 37-73 (with many references to the older literature); Troianos 131-135, 142-148. Also important are Honigmann 1967; Stolte 1997, 1998. Still useful is Zachariä von Lingenthal 1877.

[48] See Burgmann 2002 for a broader discussion of the form of Byzantine legal collections.

[49] For example, the *Coll50* and *Coll14* prologues may both be found in Paris Coislin 34; Florence 10.10, Oxford Baroc. 185, Paris gr. 1324, Vatican gr. 2184. Further examples in *Sbornik* 131-132.

[50] See especially Burgmann 2002,257, 261-264; Burgmann and Troianos 1979,199-200. Burgmann notes regular appendix structures for the *Ecloga*, the *Synopsis Major*, the *Prochiron auctum*, the *Ponema* of Atteleiotes, the *Syntagma* of Blastares, and the *Hexabiblos* of Harmenopoulos.

large, typically including a variety of later patriarchal or synodal decisions, secular laws, penitential material, question and answer tracts, synodal histories, orders of thrones, tracts on heresies, and similar disciplinary-legal material (although doctrinal definitions, and even some liturgical material, occasionally appear). Fairly stable "convoys" of such material have already been identified for a number of different recensions and collections.[51]

The first known Greek systematic collection, no longer extant, is the *Collection in 60 Titles* (*Coll60*), usually dated to shortly after 534. It is known only from the prologue of the *Coll50*, the next collection. It may have been the first eastern collection to incorporate into the eastern corpus the 85 Apostolic canons, Serdica, a number of "canons" extracted from documents associated with Ephesus,[52] and Chalcedon;[53] certainly the *Coll50* seems to include these sources as a matter of course, i.e. as if they were already present in the tradition.[54]

The second, and first extant, systematic collection of the Greek tradition, the *Collection in 50 Titles* (*Coll50*) of John Scholastikos, usually dated to c. 550, included the Apostles, the Nicene corpus expanded with Serdica, Ephesus and Chalcedon, and also now 68 canons of Basil the Great.[55] The introduction of Serdica, whether now or earlier, into the midst of the old Nicene corpus (between Ancyra and Gangra) no doubt explains the dropping of the continuous numbering system, as van der Wal and Lokin have suggested.[56] The last addition, Basil, marked the first formal and clear entrance of non-conciliar (or Apostolic) material into the Byzantine corpus. Although such "patristic" material was likely circulating earlier, in a variety of local traditions, perhaps as appendices, its inclusion in the *Coll50* very clearly alongside the conciliar material seems to mark a new stage in the material's formal integration into the mainstream Greek canonical tradition.[57]

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[51] See especially Beneshevich *Sbornik* 130-177, *Sin* 26-69. I borrow the term "convoy" from Burgmann 1992,257, 261-4.

[52] The "epistula universalis" (*Clavis* 8717) of Ephesus, divided into 6 canon, and at least one other extract from the *acta*, seem to have been included in the original *Coll50* (some manuscripts however indicate 8 canons; see Beneshevich *Syn* 6); in the later Byzantine tradition two other *acta* extracts will also be added (see *Clavis* 8800). See *Historike* 219-226; *Sources* Ephesus.

[53] Probably only 27 canons, as often the case in early collections (e.g. the Dionysiana, the Syrian collections, and the *Coll50*); three other canons, all extracts from the council's *acta*, will be included in the *Coll14*, and always henceforth. See *Historike* 256-275; Selb 1981,61; 1989,102; *Sources* Chalcedon.

[54] So *Delineatio* 42, *Historike* 38-39, *Peges* 131.

[55] Letters 199 and 210.

[56] *Delineatio* 53.

[57] On the possibility of a Syrian patristic collection of canons (translated from Greek, and including extracts from Ignatius of Antioch, Peter of Alexandria, Athanasius to Ammoun, and the full series of

The next thematic collection, the *Collection in 14 Titles* (*Coll14*), usually dated c. 580, and perhaps authored by Patriarch Eutychios of Constantinople, included probably nine more patristic sources, perhaps as many as 11, and added another letter of Basil.[58] Even more significantly, this collection also saw the first – and last –admission into the eastern corpus of a major western canonical source, the so-called *materies Africana* or *codex canonum ecclesiae Africanae* (in the Byzantine tradition simply called the "synod in Carthage").[59] An awkward translation of almost exactly the same compilation of African councils (with material from 345-419) used, and probably redacted or finalized by Dionysius Exiguus in his second compilation, this collection will become the single largest source in the eastern corpus.[60] Undoubtedly the recapture of Africa in 534 and the establishment of the Carthaginian prefecture facilitated this unusual eastward transmission.[61] A small excerpt from a council in Constantinople (394) was also probably added at this time.[62]

Many of the additions of the 6th C thematic collections find parallels in the Latin and Syrian worlds; indeed, a parallel process of updating may be envisioned across the Mediterranean throughout the 6th C and 7th C. In the Latin world, in particular, in one form or another, Apostolic material (only 50 canons), Serdica, and the *materies Africana* become a reasonably well established part of all major canonical collection sometime during this period. In the west, they are already well apparent in Dionysius – although Dionysius marks all three as still of uncertain reception.[63] In the Syrian world, the process of transmission and admission is obscurer, but Serdica will eventually make it into the west Syrian Synodika, and Apostolic material, eventually often expanded far beyond the 85 canons, will also start to appear.[64] Carthage seems to appear

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Basilian canons) pre-dating even Chalcedon, see *Sources* Fathers, and *Fonti* 2.xvi-xvii, both following the data in Schwartz 1911,322-323. Cf. Selb 1989,110-118, 145-149.

[58] For details, see Appendix A (4).

[59] Edition (Latin): Munier 1974. On this collection generally, Cross 1961, Munier 1975, Gaudemet 1985,79-83 (where the Greek translation is erroneously ascribed to Scholastikos, following Munier 1974,177), *Sources* Carthage. Two other, more minor, additions to the corpus, are also from the west: Serdica, already mentioned, may be considered western (see below n. 151), and the short extracts from Cyprian's council, first attested in the east in the 7th C, are also African.

[60] On Dionysius and Carthage, Cross 1961,133-139; so also Hess 2002,88, for example.

[61] It may have passed east more than once, in fact; canon 81 is known in two different Greek translations. See *Sources* Carthage. In the manuscripts, a number of abbreviated or selected versions are also known (see *Sin* 39-40, 100-101, *Sbornik* 247-249, 292-295).

[62] So *Historike* 62-63, *Delineatio* 61, *Sbornik* 86-87; see especially Honigmann 1961, Stolte 1998a,189. It is not mentioned in the collection's first prologue (see chapter 2.A.4); however, it is cited under a chapter in the systematic index (9.13) that otherwise would be empty.

[63] Most notably in his preface to his (lost) third collection; Somerville and Brasington 1998,49 (trans.).

[64] Selb 1981,104-110; 1989,92-102, 140-145; also Schwartz 1910, 200-201 on the possibly very early admittance of some of Apostolic material into the Syrian world. Serdica does not seem to be attested in the east Syrian synodika.

occasionally, in fragments and epitome.[65] As such, a large degree of continuity across the Christian world is still evident at this period. In essence, all traditions are still based around a similarly-expanded Nicene corpus. The textual shape of the Christian canonical tradition at this point may thus be conveyed in a single formula:

APOSTOLIC MATERIAL + NICENE CORPUS (expanded to Chalcedon, and generally including Serdica and, at least in the Latin and Greek west, Carthage) + "LOCAL" MATERIALS

At the same time, local differentiation starts to become more noticeable. Some of the Greek patristic material will pass into Syrian canon law books, but not in precisely the same form; none will pass into the west.[66] In the west, in its place, other local Latin materials, notably the papal decretals, will begin to be found regularly in the collections. These, with the increasing number of local Spanish and Gallic councils, never pass east. In the Syrian east the *synodika* will continue to gradually accrete their own lengthy traditions of local eastern councils and Syrian patristic canons.[67]

In the east, the mid-5th to 7th C cessation of canonical legislation in the empire is often explained by the large quantity of secular ecclesiastic legislation produced during this hiatus, particular by Justinian.[68] Whether or not a true causal connection between these phenomena existed, there is no question that a central feature of the eastern canonical collections during this time is the admission of much secular ecclesiastical material. It seems to have first taken the form of discreet collections appended to the corpus. Three such eastern collections are known (all here given with their 19th names): the anonymous *Collection in 25 Chapters* (*Coll25*), an collection of excerpts from the Greek sections of CJ 1.1-4 and four novels (these last later additions); the *Collection in 87 Chapters* (*Coll87*) of John Scholastikos, a more sophisticated topical collection of relevant Justinianic Novels, especially Novel 123; and the anonymous *Tripartita*, a set of topically arranged extracts from the *CJ*, *Novels*, *Institutes* and *Digest*.[69] In the extant manuscripts, these collections tend to be found together, as a close adjunct to the canonical corpus, and in the order *Coll87*, *Coll25*, *Tripartita*.[70] However, because John

[65] Selb 1989,102-104.
[66] The eastern patristic material in later western collections is mostly from different sources. On this material, see esp. Munier 1954. Also, Maassen 1871,348-382, and Appendix C (3). For Greek patristic material in Syria, see n. 57.
[67] Selb 1981,59-64, 1989.110-132, 145-152.
[68] A very useful reference remains de Clercq 1949; see also Alivisatos 1913; Pfanmüller 1902; van der Wal 1998.
[69] See generally *Delineatio* 52-54, 61; *Peges* 137-142; van der Wal 1994.
[70] van der Wal 1994,xiii-xiv.

Scholastikos is attributed with the authorship of both the *Coll87* and the *Coll50*, and in some manuscripts the two are closely associated,[71] and because the *Tripartita* sounds very much like a legal collection mentioned in the prologue to the *Coll14*,[72] and is used extensively as a source for the *NC14*, it is widely assumed that these two secular legal collections originally were attached as appendices to these two canonical collections.[73] By extension – following Zachariä von Lingenthal – scholars often hazard that the *Coll25* (without the four novels) may originally have been an appendix of the lost *Coll60*.[74]

Sometime between 612-629 material from the *Tripartita*, along with other Antecessor material (i.e. 6th C Greek translations of the Justinianic law books), was incorporated into the topical index of the *Coll14* – i.e. under the topical headings – by an anonymous compiler known to scholarship as "Enantiophanes" or the "Younger Anonymous".[75] The same "Enantiophanes" (the name is taken from a later scholiast's confusing the name of the author with one of his books, περὶ ἐναντιοφανῶν, "on seeming contradictions") – is known from fragments of a commentary on a *summa* on the *Digest* preserved in scholia to the *Basilica* and seems to have been the author of two secular legal monographs; he was evidently a jurist of some note, and is the last Byzantine until the 11th C to evince a sophisticated knowledge of the *Digest*.[76]

At some point another collection of secular legal material, mostly drawn from the *Coll87*, was incorporated into the *Coll50*, to much the same effect. This latter collection, which seems to have undergone two later recensions, the last as late as the 9th C, is attributed to John Scholastikos in the manuscripts, and its earliest forms may well be his work;[77] doubts, however, have been raised on this point, principally because of its rather clumsy composition.[78]

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[71] For example, Paris supp. gr. 483 and Vatican gr. 843.
[72] *RP* 1.7; see chapter 2.A.3.
[73] On this now *Delineatio* 53-54, 61: *Peges* 137-142; van der Wal 1994 xv-xvii; Zachariä von Lingenthal, 1877. See also chapter 4.A.
[74] Zachariä von Lingenthal 1877,614-616; the later four novels are often thought to have been added by Scholasticos when the Coll25 and Coll87, in a second redaction, were added to the *Coll50*, perhaps c. 565. See Beneshevich *Sin* 288-324; *Peges ibid.*; van der Wal *ibid*;
[75] For the literature on the nomocanons generally, see above n. 47; the most recent surveys are *Delineatio* 66-70; *Peges* 142-148.
[76] *Delineatio* 63-68; Stolte 1985; van der Wal 1980.
[77] *Sin* 292-321.
[78] So, for example, *Delineatio* 53, 67-68; Mortreuil 1843,1.200-201. They believe that the collections were produced in the order *Coll50*, *Coll14*, *NC14*, *NC50*. Most other authors retain the sequence *Coll50*, *NC50*, *Coll14*, *NC14* (with perhaps the middle two switched), although scholars are often guarded about the *NC50's* exact origin or author; e.g. Gaudemet 1965,419, with older references; *Peges* 142-143; Pieler 1997a,580.

In the 11th C Michael Psellus, in a poem, will call these mixed collections "nomocanons" (νομοκανών, var. νομοκάνονον, νομοκάνωνον), as they comprise both νόμοι and κανόνες.[79] Originally, however, these collections seem to have had no special name, simply called by the variety of fairly generic terms shared by all canonical collections (σύνταγμα, συλλογή, συναγωγή, often with the number of titles of the collection also indicated). In fact, none of the early Byzantine collections seem to have had consistent names.[80] The first attestations of the term nomocanon, in the 9th, do not even clearly imply civil-legal content at all.[81] Psellus aside, even well after the 11th C νομοκανών seems to have been a very broad term, applicable to a variety of other types of regulative collections, often including penitential collections and canonical collections clearly without civil law content.[82] Only in the later Byzantine period is there a certain tendency evident to apply the term especially to the full *Coll14*, usually in its nomocanonical form, and sometimes as "the Great Nomocanon".[83] Nevertheless, the exclusive use of the term for the Byzantine canonical-civil collections is characteristic only of modern scholarship.[84] Even today, the terminology in the modern literature for these expanded indices can cause confusion as sometimes the term "nomocanon" is used to refer specifically to the thematic indices expanded with civil laws, while at other times it is used to refer to an entire collection in which such an index exists (i.e. prologue + thematic index + corpus) – or even, confusingly, like the Byzantine usage, to any systematic collection, even *without* civil laws.[85]

During the 6th or 7th C another important canonical sub-genre may have emerged for the first time: the canonical synopsis.[86] Only one such work exists, although in multiple, gradually expanding recensions. All are straightforward abbreviated versions

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[79] Περὶ νομοκανόνου, ed. Westerink 1992,77-80

[80] *Sbornik* 58-60, 104-115 and *Sin* ii-iii, 220-222 remain the fundamental discussions of terminology, and are the principal source of what follows. See also *Delineatio* 66; *Historike* 71 n. 4. On names of civil collections (with similar ambiguities), Burgmann 2002,258-259.

[81] In a question-and-answer of Theodore Studite and in the Pannonian Life of St Methodius. *Sbornik* 106. The last, in particular, probably refers to the earliest Slavonic *Coll50* translation which does *not* have secular laws. The Methodian collection may have had a civil law appendix, however, which may account for its name. See Maksimovich 2007,9-10; also, Gallagher 2002,95-113. However, the concluding epigraph of the *Coll50* in Moscow 432 and Patmos 205, refers to the proceeding work, without laws, as a νομοκανών (*Syn* 155) – so the "plain" *Coll50* could clearly be called a νομοκανών.

[82] The best example is perhaps Aristenos' synopsis and commentary, frequently called a "νομοκανόνον" in its manuscript introductions (see those listed by Zachariä von Lingenthal 1887,255-256); for others, see *Sbornik* 109 n.1; also Naz 1957,1014. Is it possible that originally νομοκανών did not mean "canon-and-laws" but "canon *of* the law"? See Appendix A (5).

[83] *Sbornik* 109-111.

[84] *Delineatio* 66.

[85] See the comments of Stolte 1989,115.

[86] See *Delineatio* 68-69; Menebisoglou 1984; *Peges* 135-137, 245-248; Zachariä von Lingenthal 1887.

of the corpus, proceeding source by source, although all, except that to which Aristenos attached his commentary, occasionally omit older or out of date canons, and show varying levels of re-ordering, re-numbering and compression.[87] The text of the abbreviated rubrics themselves, however, seems stable.[88] The contents and orders of the canons in the three best-known (i.e. published) recensions are as follows:

In Voellus and Justel 2:673-709 (= PG 114:235-292)[89], under the name of Symeon the Logothete:	In Voellus and Justel 2. 710-748[90] (= PG 133:63-113), under the name of Aristenos (also attributed to a "Stephen of Ephesus"):	The synopsis to which the 12th C commentator Aristenos attached his commentary. It may be found in Beveridge v. 2 (= RP 2-4, and PG 137 and 138).[91] Normal order of this version:
Apostles	Apostles	Apostles
Nicaea	Nicaea	Nicaea
Constantinople	Ancyra	Ancyra
Ephesus	Neoceasarea	Neoceasarea
Chalcedon	Gangra	Gangra
Ancyra	Antioch	Antioch
Neoceasarea	Laodicea	Laodicea
Gangra	Constantinople	Constantinople
Antioch	Ephesus	Ephesus
Laodicea	Chalcedon	Chalcedon
Serdica	Serdica	Serdica
Carthage	Carthage	Carthage
Basil	Trullo	Constantinople 394
Trullo	Basil	Trullo
		II Nicaea
		Basil

Within the manuscripts, however, considerable further variation may be found. At its fullest extent, the synopsis will contain all of the sources of the standard 9th C Byzantine corpus.[92]

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[87] Cf. *Delineatio* 68.

[88] On this last, Menebisoglou 1984,78.

[89] From Paris gr. 1370. Also known in numerous other manuscripts. See *Sin* 63 n. 2, col. 2; Mortreuil 1843,3.407; *Peges* 245 n. 53.

[90] From Paris gr. 1302. In the same order, but fragmentary (ending at Antioch), is a slightly different recension in Vienna theo. gr. 283, published by Kraznozhen 1911,207-221. See also Mortreuil 1843,1.200-201.

[91] But not in normal manuscript order or appearance, distributed instead under the canons with the commentaries of Balsamon and Zonaras. Also, confusingly, the synopsis is labeled with Aristenos' name, and Aristenos' actual commentary is placed in subsequent paragraphs. For the manuscripts, Mortreuil 1843,3.408-410.

[92] From the available editions, the texts of the full form of the synopsis may be found by combining the synopsis entries under each canon in *RP* 2-4 together with the synopses of the Apostolic "Epitome" material and a few other para-canonical items, as published in *RP* 4.393-416. These last supplements are likely to have been composed in connection with the 11th C Bestes/Michael recension of the *NC14*; see *Peges* 247-248, and the manuscript information in Mortreuil 1843,3.408-416

In the manuscripts (and printed editions) these works are attributed to a variety of figures: Stephen of Ephesus, sometimes considered to be a 5th C bishop, but more likely a 7th C hierarch of the same name present at Trullo[93]; Symeon the Logothete, a 10th C author; and Aristenos, the 12th C commentator (no doubt because of the later attachment of his commentary to a later recension of the synopsis). Scholars vary in attaching these attributions to various recensions of the synopsis, and more work will be required to sort out the text's history.[94] It is clear, however, that the recensions of the synopsis preserve corpus configurations that are quite old and quite conservative, many not clearly reflecting any known configuration in the thematic collections or manuscripts. The recension attributed to Symeon is particularly interesting in this regard, as Trullo is placed after Basil, strongly suggesting that the original was pre-Trullan.[95] Its placement of the four ecumenical councils at the head of Nicene corpus material is also extremely unusual in the Byzantine tradition, and suggests an archaic configuration.[96]

Conciliar legislation resumes in the empire in 691/2 with the publication of the code-like series of canons of the council in Trullo. These are followed a century later by the canons of the seventh ecumenical council, II Nicaea, in 787, and then by the "Photian councils" of Protodeutera (861) and Hagia Sophia (879). This "second wave" of legislation, distinct in many ways from the earlier "first wave" material, is quickly added to the corpus in stages. Again the principal agent/witness for corpus expansion is the thematic collections, but now as successive updated recensions – not the production of entirely new collections. Thus, thanks to the work of Beneshevich, we can identify in the manuscripts pre-Trullan recensions to which Trullo has been added; then II Nicaea; then Protodeutera; then Hagia Sophia.[97] In each case, "acceptance" seems to have entailed various combinations of entry into the corpus section, integration into the systematic references, and mentions and listings in prologues. The *Coll50* likewise was gradually updated, although the stages in this process have not yet been carefully

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[93] *Peges* 136.
[94] See *Delineatio* 68-69; Menebisoglou 1984,77-82; Mortreuil 1843,1.200-201, 3.408-410; *Peges* 245-247.
[95] See. *Delineatio* 68; *Peges* 136-137. Menebisoglou 1984,79 believes that the earliest recension of the synopsis may pre-date Chalcedon.
[96] In *Delineatio* 77 it is stated in error that the "Tarasian" recension had such an order. It is clear in *Sbornik* 260-288, to which they refer, that it did not. I know of only one other witness to this order: an incipit index to the *Coll50* found in Oxford Barocc. 86 43r-49r, as per Beneshevich's description *Sin* 60 (cf. *Sbornik* 83 n.3). The four-council order is common in the west, where it has no little ideological significance: see the introductions to the *Hispana* and Mercator, Somerville and Brasington 1998,55-57, 82-91 (trans.); also Congar 1960. It is perhaps suggested by *N.* 131.1
[97] See below, section C.5.

identified nor correlated with specific events or dates – and typically the newer material is simply added after the older systematic corpus, not inserted into it.[98] But later versions of the *Col50* tend to contain very similar material as contemporary *Coll14* recensions.[99]

A few other canonical sources also establish themselves in the corpus during this time. An extract from the council of Carthage in 255 under Cyprian appears in a pre-Trullan recension of the *Coll14* corpus, placed after Nicaea 325 itself, i.e. as the first of the councils save Nicaea.[100] It appears again in the corpus delineated by Trullo 2, now after all of the patristic canons. Never terribly common in the earlier manuscripts, its fortunes will vary in later manuscripts, often absent, sometimes present but in different positions, either right at the end of the councils, or among the fathers, or in an appendix.[101] In Trullo 2 three other patristic sources also now make a definite appearance, bringing the total to the symbolic number of twelve. The number and order of the patristic sources listed in Trullo 2 will nevertheless vary throughout the manuscripts tradition, not settling until after the 12th C commentators.[102]

Some of this "second wave" eastern material passes west, as per tradition, but now much more desultorily. A thorough analysis has never been performed, but some of the Trullan canons, and some of those of II Nicaea, were accepted into at least some western collections; some will appear in Gratian.[103] To my knowledge, neither council seems to pass into the Monophysite or Nestorian east, although they do, not surprisingly, appear in some later Arabic Melkite sources.[104] Curiously, however, Cyprianic material does appear in the east and west Syrian synodika.[105]

The recension of the *Coll14* that admits the Photian councils – usually called the "Photian recension" although it is not clear if or to what extent Photius had any hand in

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[98] On this last *Sin* 250, although he notes a number of exceptions. Of these see especially Group G, *Sin* 179-185.
[99] For example, see Beneshevich's Group C, D and G, Vienna hist. gr 7 (*Sin* 108-126), or Coislin 364 (*Sin* 150-165). "Soft spots" in the *Coll50* tradition are similar to those of earlier recensions of the *Coll14*, and include Amphilochius, Gregory Nanzianzus, Cyprian, Hagia Sophia, and Carthage in full (selections are more common).
[100] In Patmos 172 (described *Sbornik* 230-236). On this canon generally, and its fate in the manuscripts, see *Delineatio* 69-70, *Historike* 81-82, *Fonti* 2.301-303 (esp. n.1), *Sources* Cyprian.
[101] Compare its place, for example, in Beneshevich "Recensio Photio protoypa" (*Sbornik* 130-177), Jerusalem Cruc. 2, Laud.39, Florence Laur. 10.1, Vallic. F.10, Vatican gr. 829.
[102] See *Fonti* 2.xiv-xx; *Sources* Fathers.
[103] For Trullo, see now Kuttner 1995; for II Nicaea, see the index of Gratian's sources (Friedberg 1879,1.xx).
[104] Graf 1944,1.598-600. Dura 1995,238-240, however, claims greater presence in non-Chalcedonian circles.
[105] Selb 1981,110; 1989,102-104.

it – marks the closing of the Byzantine corpus of canons.[106] Datable to 883, it corresponds neatly with what will, in retrospect, be a cessation of imperial ecumenical councils, and certainly of imperial ecumenical councils producing series of regulations. Official disciplinary legislation does not cease, but henceforth will take the form mostly of specific enactments of the Constantinopolitan ἐνδημοῦσα σύνοδος or imperial novels.[107] These will slowly be collected and added to canonical manuscripts, but neither they, nor any other "appendix" type material added to the tradition, will ever truly penetrate the older canonical corpus itself, and be ranked with "the canons" proper in quite the same way as the older material – i.e. be incorporated into the *Coll14* or *Coll50* indices or tables of contents themselves.[108] They will henceforth always appear in the manuscripts as a more variable outer valence of appendix material, *around* this core, almost as an exegetical expansion of the earlier material – and indeed, in content most of this later material is devoted to sorting out details of the older tradition.[109]

Further, in no case does any other later collection of canons ever comes even close to replacing or displacing the *Coll14* corpus. The later tradition is always written around this core, at more re-organizing it. Despite a constant blurriness around its edges,[110] then, the 883 corpus will emerge in the manuscripts as the regular and sealed "core" of the canonical tradition – a position it retains to this day in the modern Orthodox churches.[111]

It is difficult to say, however, to what extent this closing of the corpus was perceived by contemporaries. Certainly the *Coll14* corpus, in any redaction, was not immediately considered *the* authoritative statement of the corpus, even after Trullo, and

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[106] Generally, *Delineatio* 87-89, *Historike* 83-91. The extent of Photius' participation in this recension is debated; see Dedemos 110-112, *Delineatio* ibid., *Historike* 86-87, Meliara 1905-1906, *Peges* 145, Petrovitz 1970,34-38, Stolte 1997.

[107] Dölger 1925-1965 and Grumel 1972-1991 remain the standard repertories of the imperial and patriarchal material. However, no thorough survey of the documents of this type typically found in canonical manuscript appendices – i.e. physically part of the canonical tradition – has yet to be produced. A selection of the most important may be found in *RP* 5; for the patriarchal decisions, a particularly convenient list may be found in Milaš 1902,157-165, and *Peges* 232-240, 295-297 is the most recent overview.

[108] There are exceptions of course; for example, the *Coll50* Group G does add some prominent later appendix material under its references (*Sin* 179-185). So also in one chapter of the *Coll14* in Vat 827 (*Sbornik* 252). There are likely some others, but such instances seem to have been quite occasional, and more or less failed experiments, "testing" as it were the level of acceptance of this later material.

[109] The secondary nature of the later literature has been frequently remarked; see e.g. Beck 1977,142-147; *Delineatio* 97; cf. *Peges* 235. The later reception of some of this material could be quite slow and uncertain. See Burgmann 1985.

[110] The varying presence of Cyprian, Athanasius, Gregory Nazianzen and Amphilochius, and even Hagia Sophia are the chief examples of this "blurriness".

[111] There is widespread consensus on this point; for example, *Historike* 91-100; L'Huillier 1996,7 n. 44; Meyendorff 1983,80-81; Milaš 1902,107-155; Tsipin 1994,30-31.

it is never "officially" established.[112] It is curious, in fact, just how many witnesses there are to the slow reception of the *Coll14* corpus. John of Damascus in the 8th C, when listing "the canons", clearly cites the corpus of the *Coll50*.[113] In the 9th C, a letter of Pope Nicholas to Photius seems to refer to the *quinquaginta titulos* as the Byzantines' official collection.[114] The synopsis tradition likewise seems more or less confined to the *Coll50* until the 11th C or so – even after it adds Trullo, which prescribes the further patristic sources. Perhaps most telling, Michael Psellus, in a poem written for the to-be-emperor Michael VII – i.e. in what we might expect to be a reasonably "official", or at least learned, statement of the corpus – will describe a corpus that is almost certainly an expanded *Coll50*, not the *Coll14*.[115] Even Aristenos in the 12th C does not comment on Protodeutera, Hagia Sophia and any fathers aside from Basil – i.e. his corpus looks like the *Coll50* corpus expanded with Trullo, II Nicaea, and the first letter of Basil.[116] Indeed, Zonaras and Balsamon do not comment on exactly the same 883 corpus either (although their collections contain the un-commented canons): thus Zonaras does not comment on Timothy, Theophilus, Cyril, or Gennadius, and neither Zonaras or Balsamon comment on Amphilochius.[117] All of this witnesses to the presence of a very strong, conservative impulse throughout most of the middle Byzantine period that was inclined to view the core of the core, as it were, as something closer to the original *Coll50* corpus. This does not mean that the later *Coll14* material, confirmed at Trullo, was not present, known or used; indeed, by the end of the 11th C it seems to have become well entrenched.[118] But at least its outer edges, the patristic material in particular, and the most recent conciliar material, seem not to have "settled" into firm recognition for some time.

It was soon very clear, however, as noted, that the corpus would not substantially grow beyond its 883 revision. The next major recensions of the *Coll14*, those of Michael the Sebastos and Theodore the Bestes in the late 11th C, only slightly

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[112] On the "official" promulgation of 920 sometimes mentioned in the literature, see section C.6.
[113] *PG* 94.1432cd, cited in *Sin* 326.
[114] *Mansi* 15.176,263 cited *Sin* 326. This section of the letter may not be original, however; see Deledemos 2002,76 n. 183.
[115] Westerink, 1992,77-80. So Menebisoglou 1984,88, *Peges* 249-250, *Sin* 327. Contra: *Delineatio* 106, who suggests it is the *NC14*, but this is almost certainly a mistake, perhaps even a typo.
[116] *RP* 2-4, checked against various manuscripts, e.g. Moscow 237, Vatican 840, Vienna iur. gr 10.
[117] *RP* 2-4, checked against Florence Laur. 5.1, Moscow Sin. 393, Vatican gr. 828, Venice app. 3.01, 3.03. There is a certain amount of variability among the descriptions and editions, however; new editions of Zonaras and Balsamon are sorely needed.
[118] *Peges* 241-242; *Sbornik* 109-111.

clean up and complete some of the corpus references of the 883 recension.[119] Substantial *additions* of new sources are only made to the secular legal material in the systematic section of the collection.[120] The canonical portion of the collection was thus essentially frozen. The next major recension of the *Coll14* will not venture even this: Balsamon appends his commentary to the secular material *after* the traditional nomocanonical texts, just as he does in the corpus section of the collection.[121] He does not seem to interfere with the existing tradition. As such, Balsamon, along with the other commentators, effectively seal – or at least witness to – the ultimate ossification of the 883 corpus.[122] It is probably at this point that the *Coll14* additions – seven centuries after their articulation! – are finally accepted as beyond question. The long-term success of the *Coll14* corpus as the sacred core of the whole tradition was assured.

C. Major contours of the tradition

1. Unity, stability and continuity

The single most striking characteristic of Byzantine canon law as a textual phenomenon is its uniformity and stability. Contrary to the pervasive tendency in the modern literature to speak about Byzantine canon law as a succession of different collections,[123] or as otherwise quite varied and diverse,[124] the Byzantine tradition possessed in a very real way *only one canonical collection*. This should hopefully already be apparent from the above narrative. At the heart of this collection was the

[119] It re-adds some Carthaginian and Basilian material that had been omitted, for example, along with other Apostolic texts; see Schminck 1998,379-383, and below section C.1, esp. n. 138. According to Schminck, its basis seems to be Jerusalem Pan. Taph 24, which had included the omitted canons in a catch-all chapter in Title 14. Schminck 1998 has revolutionized our knowledge of this recension – or rather, recensions. It was known to previous scholarship as the recension of "Theodore Bestes".
[120] Published as the *auctaria* in *Pitra*.
[121] I owe this observation to *Delineatio* 111.
[122] In his commentary on Trullo 2 Balsamon famously condemns the use of the *NC50* – although mostly, it seems, because of its selection of secular laws. *RP* 2.311
[123] Everywhere the tendency is to speak of multiple collections succeeding each other, instead of the growth and development of one collection over time. Hess 2002,54, for example, states that "[d]uring the sixth century the 'Antiochene Collection' was superseded by others, but it was fortuitously translated into Latin...before disappearing entirely from the Greek East". Similar expressions may be found in Burgmann 2002,241; Feine 1954,83; Price and Gaddis 2005,3.94 n.6; Schwartz 1910,195; 1936a,159-160. See also how Plöchl 1959,1.441 speaks as if Trullo constituted a completely new self-standing collection (so Ferme 1998,81; Morolli 2000,313).
[124] For example, Nelson 2008,299; Stolte 2008,694; cf. Plöchl's similar (273-274) but cryptic, and rather odd, statement (repeated in Ferme 1998,78) that the sources of eastern church law reflect from the 6th C a fragmentation of the eastern church' unity (giving as an example the Acacian schism). This is part of an older narrative – appropriate enough when restricted to the west – that tends to see the first millennium canonical tradition as a story of regional *Partikularismus* and fragmentation except, perhaps, where influenced by Rome; see for example Cosme 1955,1995a, Fournier 1931, Stickler 1950.

Nicene corpus which was gradually subjected to various processes of expansion but never replaced or substantially or permanently modified (selected or interpolated). The entire Byzantine canonical tradition is simply the story of the expansion, confirmation, and re-issuing of this gradually growing and ever-ossifying central corpus structure. Indeed, this *idea* of a uniform core-corpus structure is probably the central conceptual structure of the entire tradition.

This stability and uniformity becomes most obvious when one examines the extant Byzantine manuscripts. Turner long ago noted that "[t]he most obvious difference between Greek and Latin manuscripts of Canons, taken in the mass, is the striking resemblance of the former among themselves contrasted with the almost infinite degree of divergence from one another which prevail in the latter. The contents of Greek canonical MSS are always more or less the same...".[125] Indeed, by manuscript standards, the Greek texts are strikingly uniform. Most complete manuscripts follow a very similar pattern, starting with some type of prologue section, followed by a systematic index or two[126] (perhaps in nomocanonical form), followed by the corpus itself. The corpus in most extant manuscripts, whatever its exact form, or systematic index, is something approaching the full 883 corpus, perhaps with commentary and almost always followed by a selection of appendix-like materials.[127] In some manuscripts, smaller *Hilfsmittel* type works, it will sometimes be replaced with the synopsis and Aristenos – a kind of "mini corpus".[128]

The texts of the corpus canons themselves, as Joannou notes, are apparently remarkably stable, and with little regular omission, re-ordering, paraphrasing or interpolation.[129] Likewise the physical appearance and layout of the manuscripts, while slightly variable, almost never surprises. They are mostly quite plain and functional, with bland and unremarkable breaks between the sources,[130] simple marginal numberings for the canons, and, sometimes, marginal scholia. Some elements of manuscript structures may be in slightly different order. For example, the corpus

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[125] Turner 1914,161.
[126] See the list in *Syn* v-vi for pairings of the *Coll50* and *Coll14*, in various forms.
[127] In other words, earlier collections in the manuscripts have generally been updated, to some extent, to approach the 883 corpus.
[128] E.g. Vatican gr. 840
[129] *Fonti* 1.5; reaffirmed by L'Huillier 1996,9-10. Such statements should be considered tentative, however; the internal state of the texts have probably not yet been sufficiently studied.
[130] Typically simple undulating lines, perhaps with some floral motifs, occasionally developing into more complex, but abstract, decorations in blank spaces or section headings (e.g. Sinai 1112 4v or 77r; Rome Vallic. F. 47 23r). Further illustration and decoration (e.g. miniatures) of Byzantine canonical manuscripts is otherwise very rare; see Hajdú 2003,100-101 for an exception in Munich gr. 122 (small conciliar scenes), with further references.

sometimes precedes the systematic indices.[131] The appendix materials, and to some extent the prologue texts, are also quite variable, although they tends to include broadly the same *type* of material.[132] Throughout, then, the overall picture is very regular; there is a very recognizable and predictable "shape" and content to a Byzantine canonical manuscript.[133]

It thus soon becomes apparent that one has, in effect, the same collection in a variety of different versions. If one looks back over the sweep of the tradition as a whole, as related above, there seems to be little reason to doubt that this stability and uniformity had obtained in the Byzantine east for some time – and indeed, to a surprising extent, across the Latin and Syrian traditions as well. This uniformity and stability has two aspects: in the general "idea" and morphology of canonical collections, and in the contents of a typical collection.

As to the former, from the moment we first glimpse the Nicene corpus, all of the witnesses (Maassen's general "chronological" collections, the Syrian *Synodika*, all the Byzantine sources) point to one central idea of what constitutes a full, proper canonical collection: a canonical collection conveys "the corpus". This corpus is a body of traditionally accepted legal sources, listed one after another, and with little or no significant selection or interpolation (this is particularly true in the Byzantine sources). The exact content and boundaries of "the corpus" will vary somewhat from place to place and time to time, but it is always nevertheless an identifiable structure at any particular moment (on this, more below). In all cases, faithfully transmitting this core corpus seems to be the primary point of a full canonical collection.[134]

The options for presenting this corpus are also few. Generally, east and west, collections will include some type of prologue or prologue sections, then perhaps a systematic index, then "the corpus" of canonical materials followed by (or fading into) a much more variable and idiosyncratic group of appendix materials.

Smaller collections do exist that are much more selective among even "core" material, the text of which is often abbreviated. These collections, however, are always clearly very practical *Hilfsmittel* type works, obviously built against the background of

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[131] For example, in a number of Beneshevich's "Group A" manuscripts of the *Coll50* (*Sin* 59). For the *Coll14*, see Vatican gr. 2198.
[132] See above, and the references in nn. 50, 51.
[133] There are some exceptions, but before the 16th C they tend to prove the rule: they are certainly very surprising when one stumbles upon them. See Appendix A (6).
[134] In the literature this point tends to be recognized for the older chronological collections, such as Dionysius or the *Hispana* (e.g. Zechiel-Eckes 1992,1.29-30; Mordek 1975,3); but it equally true for early systematic collections; see below.

the proper *libri canonum*. Perhaps constructed to address a specific topic or problem, they are handbooks to the corpus, from the corpus, which always remains a tangible structure to which they refer. In the west, these minor collections are many, and will eventually become very diverse, especially north of the Alps, where the idea of "the corpus" seems to have become rather thin; in the east, the only substantial examples in our period are the synopses,[135] and even they follow the contours of the corpus of their day very closely, as do some of the earliest such collections in the west, such as those of Martin of Braga or Fulgentius Ferrandus.[136]

Early systematic collections, at least in the east in our period, and certainly in the beginning in the west as well (most notably in the *Concordia* of Cresconius[137]), do not represent exceptions or major transformations of this "idea" of a collection. They are merely thematic recensions of "the corpus" which they convey in full. While they do mark moments in which new material is introduced into the corpus, and they play a critical role in defining the corpus, their faithfulness is very marked in conveying complete and intact the material that at their point of composition is traditional. Thus both the *Coll50* and the *Coll14* (and Cresconius) contain every canon of the corpus as it seems to have existed before their time; the evidence of selection (mostly in their references to the material under their topic headings) or abbreviation they display is only in the outermost fringes of the corpus, usually in the material they have themselves probably just added to the corpus – i.e. the newest, least traditional material.[138] In this, these collections are very different from later western systematic collections, which ultimately emerge as moments of permanent substantive selection, synthesis and sorting of earlier material.[139] The early Byzantine systematic collections are little more than glorified tables of contents *to* the corpus. In this, any tendency to speak as if the earlier Antiochian or Chalcedonian collection "disappears" from the Byzantine tradition is extremely misleading: it simply changes form. Likewise, the common narrative of the transformation of "chronological" collections *into* "systematic" (and of the two almost

[135] Another example at the end of our period is the Slavonic translation of the *Coll50* made (probably) by Methodius for his mission. It is abbreviated and shows evidence of selection, no doubt for convenience of the early Slavic mission; see Gallagher 2002,100-113.
[136] Gaudemet 1985,137-137, 152-153.
[137] Zechiel-Eckes 1992.
[138] The *Coll50* in fact does convey every single canon of its corpus – and mostly only once. It is almost literally a re-arrangement of the corpus. The *Coll14* omits some canons from Carthage and its new Basil additions (i.e. from the first canonical letter). Cresconius likewise omits only some items from Carthage, and elements from the decretals (see Zechiel-Eckes 1992,1.7,18). See Appendix A (7) for more details.
[139] Gratian's *Decretum* is the ultimate example; see the index of his sources Friedberg 1879,xix-xli. See Appendix A (8) on this curious Latin phenomenon.

competing) – borrowed from later western canonical historiography, where it is accurate – is problematic.[140] Eastern systematic collections, like their early western imperial counterparts, *are* the old "chronological" corpora, but now merely with some level of systematic re-arrangement or indexing; they are not in any way replacements of it, or substantively discontinuous with it. The earlier structures are always preserved, and completely so. The extraordinary conservatism of these collections will be explored in greater depth in chapter four.

As to content, "the corpus" is always – west and east – an identifiable recension of the Nicene corpus, in various stages of expansion. The Nicene corpus is not "a" Byzantine collection of the first millennium; it is *the* collection of the entire early Christian world. As already noted, its content from Nicaea through Chalcedon, usually with Serdica and some version of Carthage and the Apostles, is the common core of virtually all major "general" Christian canonical traditions, certainly around the Mediterranean.[141] Even after the 6th C, when the Latin, Greek and Syrian collections begin to develop along separate paths, later developments emerge mostly as a matter of the gradual addition or expansion of this old Nicene corpus – and the thus the Nicene core is itself remarkably persistent. A striking unity in both the "idea" *and* content of the Christian canonical tradition is thus to be observed across the Christian world for much of the first millennium.[142]

The tendency for the tradition to develop as a gradual expansion of Nicene core is particularly pronounced in the east. In effect, at least from the 5th C onwards, between any two collections of core corpora, one will always contain the entirety of the other, i.e. the one is always simply an expansion of the other. Variations may exist among appendix-like materials, but two collections are not to be found with entirely or even mostly different "core" materials – one missing perhaps Ancyra, or Nicaea, for example. This stability and uniformity of development is easily demonstrated with a schematic of the corpora of the principal Greek collections (additions to each stage in boldface):

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[140] Assumed everywhere, but see briefly Zechiel-Eckes 1992,1.29-31; Fransen 1973,14-15; Maassen 1871,3-4; Mordek 1975,4-16; Somerville and Brasington 1998,12-13. Fransen (*ibid.*) can thus, for example, call the collection of (Pseudo) Isidor Mercator the "last" chronological collection in the west – and these collections do stop being widely copied in the high middle ages. But there is no "last" chronological collection in the east. The traditional typology of collections as "chronological" and "systematic" is problematic in other ways as well; see Appendix A (9).

[141] Hibernensis, in Ireland, would be a major exception. See Sheehy 1982.

[142] The lack of emphasis on this early unity is perhaps the single oddest characteristic of modern canonical historiography. See Appendix A (10)

Antiochian corpus
[ANCYRA] + [NEOCAESAREA] + [GANGRA] + [ANTIOCH] + [LAODICEA?]

Nicene corpus (approx. as at Chalcedon 451)
[NICAEA] + [ANCYRA] + [NEOCAESAREA] + [GANGRA] + [ANTIOCH] + [LAODICEA?] + **[CONSTANTINOPLE I]**

Coll60 (c. 534?)
[APOSTLES] + [NICAEA] + [ANCYRA] + [NEOCAESAREA] + **[SERDICA]** + [GANGRA] + [ANTIOCH] + [LAODICEA] + [CONSTANTINOPLE I] + **[EPHESUS?]** + **[CHALCEDON]**

Coll50 (c.550)
[APOSTLES] + [NICAEA] + [ANCYRA] + [NEOCAESAREA] + [SERDICA] + [GANGRA] + [ANTIOCH] + [LAODICEA] + [CONSTANTINOPLE I] + [EPHESUS] + [CHALCEDON] + **[BASIL (68 CANONS)]**

Coll14 (c. 580)
[APOSTLES] + [NICAEA] + [ANCYRA] + [NEOCAESAREA] + [GANGRA] + [ANTIOCH] + [LAODICEA] + [CONSTANTINOPLE I] + [EPHESUS] + [CHALCEDON] + [SERDICA] + **[CARTHAGE]** + **[CONSTANTINOPLE 394]** + [BASIL (68 CANONS)] + **[~9-11 ADDITIONAL FATHERS, AND REST OF BASIL]**

Corpus of Trullo 2 (691)
[APOSTLES] + [NICAEA] + [ANCYRA] + [NEOCAESAREA] + [GANGRA] + [ANTIOCH] + [LAODICEA] +[CONSTANTINOPLE I] + [EPHESUS] + [CHALCEDON] + [CONSTANTINOPLE 394] + [SERDICA] + [CARTHAGE] + [12 FATHERS, INCLUDING BASIL] + **[CYPRIAN]**

Corpus of 883 Coll14 recension (order of 883 Coll14 index ἐκ ποίων, RP 1.10-11)
[APOSTLES] + [NICAEA] + [ANCYRA] + [NEOCAESAREA] + [GANGRA] + [ANTIOCH] + [LAODICEA] + [CONSTANTINOPLE I] + [EPHESUS?] + [CHALCEDON] + [SERDICA] + [CARTHAGE] + [CONSTANTINOPLE 394] + **[TRULLO]** + **[NICAEA II + TARASIOS]** + **[PROTODEUTERA 861]** + **[HAGIA SOPHIA 879]** + [~12 FATHERS] + [CYPRIAN]

Corpus of 883 Coll14 ("systematic" order as typically found in Zonaras and Balsamon recensions)
[APOSTLES] + [NICAEA] + [CONSTANTINOPLE I] + [EPHESUS] + [CHALCEDON] + [TRULLO] + [NICAEA II] + [PROTODEUTERA 861] + [HAGIA SOPHIA 879] + [CYPRIAN] + [ANCYRA] + [NEOCAESAREA] + [GANGRA] + [ANTIOCH] + [LAODICEA] + [SERDICA] + [CARTHAGE] + [CONSTANTINOPLE 394] + [~12 FATHERS]

Although this schema is simplified, and does not communicate isolated variations among individual manuscripts, it nevertheless conveys the general shape of the tradition as *one* collection that is slowly growing. It is interesting that even differences in patterns of ordering of the material are few and restrained.[143] Certainly profound change to existing corpus material is not in evidence. Indeed, in the Byzantine tradition we may observe a striking rule: *once a canonical source is accepted into the core corpus,*

[143] See below section C.5.

it never leaves. Development will always tend towards accumulation and preservation of traditional sources, not processes of sorting, revising or selecting.[144] Even quite clearly obsolete or apparently rescinded canons tend to continue to be copied.[145]

Of course, the process of the definitive reception of sources into the corpus takes time, and thus among different recensions and manuscripts a certain "softness" may be detected in the transmission of more recent or marginal sources. Carthage, for example, apparently first added in the later 6th C, is often present in abbreviated forms in the later expanded *Coll50* recensions, and the references to this source in the earliest *Coll14* thematic index are not complete – its material is not yet inviolable. Some of the later patristic canons, and also Cyprian, as noted, likewise will fade in and out of the corpus for some time. But these sources eventually tend to become firmly established in the corpus; the *Coll14*s omissions in Carthage, for example, will be remedied in a later the *Coll14*,[146] and after the commentators virtually all of the 883 patristic sources are well established. Only in smaller handbook or extract-type collections are canons ever *regularly* abbreviated, omitted or interpolated. In larger collection such instances are not entirely unknown, but they seem very occasional.[147] Never do such changes turn into sustained, *permanent* selection or interpolation of material in the tradition as a whole. Omitted corpus material can and will always eventually resurface in any collections with pretensions to completeness. The overall movement of the tradition is overwhelmingly towards complete, faithful transmission of a unitary traditional corpus.

Real diversity among the Byzantine collections is thus always comparatively minor, at least by the standards of manuscript cultures. Between any two given manuscripts or recensions, diversity is mostly restricted to framing material and newer materials that form the outer valences of the "core" – and slight differences in order. But these differences never extend to the point that one cannot recognize any two collections as fundamentally different versions of the same text. Substantially different

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[144] This dynamic is frequently noted in Byzantine law more generally; for example, Burgmann 2002,263; Stolte 2008,692-693.

[145] For example, the rules in Apostles 37, Antioch 20 and Nicaea 5 on holding synods twice a year, despite the clear relaxation to once a year in Trullo and II Nicaea; or Ancyra 10, which allows deacons to marry, despite Trullo's clear rejection of this exception.

[146] See Appendix A (7) for details.

[147] Beneshevich occasionally notes some omissions, for example in Vallic. F. 47 in Trullo (*Sbornik* 264). I have also observed some omissions in manuscripts, also in Trullo (in Laud 39 157v; although the omission is noted by the rubricist). The true extent of such omissions – and whether or not they tend to be limited to sources perceived as new or less certain (as possibly Trullo) – will hopefully become apparent in the upcoming survey of Burgmann and Schminck. Radical and regular patterns of omission, however, seem unlikely: certainly they have not appeared in the editions.

"competing" corpora are present only inasmuch as an older and newer recension of the Nicene corpus circulate alongside of each other.

The face that the Byzantine tradition presents as a textual reality is thus a highly hieratic and conservative one, centered upon the concept and reality of one continuous, unified, central core corpus. This corpus structure gradually expands, and its edges may often be blurry, but at any given moment a core of inviolable material is always identifiable, and this traditional material is never significantly or permanently modified or omitted. The central dynamics of this corpus-centered tradition are thus preservation, persistence and agglutination. The Byzantine canonical tradition is above the story of one text: its expansion, its uses, and its interpretation. (In this Byzantine canon law mirrors, if in a much more dramatic and exaggerated way, the Byzantine secular tradition's attachment to the Justinianic corpus.[148])

2. A Greek phenomenon

The Byzantine canonical tradition is an overwhelmingly Greek phenomenon. The Byzantine canons are not only found in Greek in the extant manuscripts,[149] but most were originally composed in Greek, and in the east.

A few important observations must be made about the "Greekness" of the canons.

It witnesses first to the relative impermeability of the eastern canonical tradition. In the entire history of the tradition, even until the end of the empire, only three sources from outside the Greek east are ever able to penetrate into the corpus itself.[150] All are from the west: Carthage, the "canon" of Cyprian, and Serdica.[151] Only the first is

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[148] Which is never clearly replaced or abrogated in the Byzantine east, and always constitutes a kind of symbolic touchstone for the whole tradition; see especially Fögen 1993,67-68; Haldon 1990,258-264; Kunkel 1964,181; Lokin 1994,71-72; Pieler 1978,449-450; Stolte 2008,691-693. see also Prinzing 1986, and for the older discussion on the later validity of Justinian's law, Wenger 1953,720-723.

[149] Although a few Latin marginal notations to Carthage seem to have made their way into Moscow 432 (*Sin* 86, 92).

[150] A few other Latin items may occasionally be found in the appendices, for example (fairly frequently) the letter of Leo I to Flavius on Eutyches (see Athos Panach.6-7, Cambridge Ee.4.29, Oxford Laud. 39, Vienna hist gr 7). But this text is doctrinal in orientation. The Donation of Constantine will also later appear in the tradition, most notably in Balsamon (RP 1.145-148); it will later be found as a regular item in the appendices to the secular 14th C *Hexabiblos* (Burgmann 2002,262).

[151] On the *status quaestionis* of the peculiar origin and transmission of the canons of Serdica, see *Sources* Serdica. The recent renewal in Hess 2002 of the Ballerini's theory of a double-edition of the canons, taken down by Latin and Greek scribes, has not received universal acceptance (contra: *Delineatio* 122), but seems likely. Whatever the case, the Serdican canons read in Greek as Latin translation material, are in the typically western "parliamentary" form, and are generally treated as western in the Byzantine tradition (for example in the scholion to the *Coll14* Ἰστέον RP 1.12; see also scholia 217a, 228 in *Sbornik* Prilozh. 28-30).

significant in terms of size, and all will exist for some time as "soft spots" in the manuscript tradition, omitted, abbreviated, and in slightly subordinate or uncertain positions.[152]

The admission of these western conciliar sources highlights one striking absence: papal decretals. This is a point that needs emphasis because of the overwhelming tendency of modern textbooks of canon law to speak as if canon law naturally has "two sources", even quite early: conciliar enactments and papal decretals. This double-source theory undoubtedly holds true in the west, but in the perspective of the history of Christian canon law a whole, it is unquestionably a local Latin phenomenon. Even in the west this theory arguably reaches its apogee only in the high middle ages, when papal legislation finally becomes a central vehicle of western canon law (certainly of its development).[153] In our period the papal material sits in the western collections, formally at least, in a markedly appendix-like position, i.e. parallel to the patristic canons in the east, *after* all of the conciliar canons, even very local ones, and often among the most variable parts of the collections.[154] Canonical collections, Greek, Latin and Syrian, are always primarily Apostolic and conciliar in content and form – and then, in the Latin west, papal or, in the Syrian and Greek east, patristic/patriarchal.

Greek corpus impermeability highlights another important dynamic in first millennium canon law: the movement of canonical material is overwhelmingly from the Greek east *outward*. In this, Greek canon law is in a sense the "central" tradition of the first millennium. As we have seen, the core corpus of all Christian churches – at least in the empire – emerges from the east, and is largely updated from the east. This position as an active center of canonical production gradually fades but its legacy is clear: all major first millennium Christian collections, at least within the (old) imperial cultural sphere, contain as their clear core Greek Apostolic material and the *sine qua non* Greek Nicene corpus. As a textual phenomenon, Christian canon law is at core a Greek imperial phenomenon.

This "Greekness" of canon law in the first millennium should not, perhaps, surprise. In this, the textual reality of canon law is following a well-worn path of Greek

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[152] See further section C.5.
[153] "Le règne des Décrétales" according to Gaudemet 1994,375-407; significantly this material now becomes the "new law" of the church, in the phrase of Bernard of Pavia (d. 1213; Somerville and Brasington 1998,219) See generally Brundage 1995,53-56,160; Fransen 1972,11-14.
[154] See Fournier 1931,30 (and n. 2); Fransen 1972,17; Jasper and Fuhrman 2001,22-87; Zechiel-Eckes 1992,1.7,18; also Maassen 226-308 *et passim.*.

to Latin/Syrian/etc. transmission, which Scripture, much theology, monastic writings, and numerous other types of Christian (and before them, pagan) cultural expression had long followed.[155] It reflects above all the Greek origins of most early Christian literature and the continued political and cultural preeminence and vitality of the eastern empire throughout the first millennium.

Nevertheless, the Greek character of canon law, even in the east, does surprise a little, and should perhaps not be taken for granted. The one aspect of Greco-Roman civilization that seems to be specially the domain of Latin is precisely law and administration, and indeed, as F. Millar has recently strongly reiterated, the administration of the Greek east, at least at its higher levels and in formal expression, was still resolutely Latin throughout most of the 4th and 5th C – the time of the formation of the core "first wave" material.[156] Legal judgments still had to be formally issued in Latin until 397, many Latin notarial formulae remained in use throughout the 5th C, and eastern imperial legislation starts to drift into Greek only slowly throughout the 5th C, not truly supplanting Latin until the 530s.[157] In this context, it is perhaps a little surprising that, *even in the east*, the chief (internal) texts of order and administration of the 4th and 5th C imperial church are *not* in Latin. This is true even of the texts of the highest order, the ecumenical councils – precisely where, ironically, as Millar points out, it becomes evident how meager the eastern episcopate's knowledge of Latin really was.[158] Church order, therefore, unlike civil order, was a distinctly Greek affair. In terms of the core content of the canonical collections, this was even true in the Latin west. If secular law and order in late antiquity seem to be mostly a Latin phenomenon, this was not true in the ecclesial realm.

3. Size

The next observation emerges mostly as a point of comparison with the western tradition, and has already been alluded to: the Byzantine canonical tradition is quite compact. It is difficult to know how long early Byzantine canon law manuscripts may have been, and particularly how much appendix-type material, perhaps lost, might have followed the various recensions of the corpus. Nevertheless, if one takes almost all of

[155] Marrou well reminds us that the image of antique culture as constituted by two parallel and equal Latin and Greek spheres is problematic: Latin culture is in many respects a subsidiary phenomenon of a broader Hellenistic reality (Marrou 1948,242).
[156] Millar 2006,84-107 *et passim*.
[157] See *Delineatio* 19; Jones 1964,988-991; Krüger 1894,312; Matthews 2000,28-29.
[158] Millar 2006,85, 97-107.

the extant pre-10th C canonical material – i.e. everything that might have been prominent in a large manuscript of this time – the total is quite modest. It includes three prologues, two systematic indices, approximately 770 canons, a smattering of other material from the *Apostolic Constitutions*, the canonical synopsis, three comparatively short civil law collections (in total approximately 620 separate fragments, varying in length from a line to several pages), the civil law material of the nomocanonical recensions (largely overlapping with the previous collections), perhaps some scholia,[159] and some other isolated jurisprudential material.[160] Exact calculations are difficult without electronic databases, but I estimate that taken together this material – the full effective canonical corpus of the eastern empire – comprises perhaps 150 000 words. This is perhaps three fifths the size of the *Hispana* – a major western collection from two centuries earlier that does not include western civil ecclesiastical law material, scholia, or other appendix or framing material.[161] It is closer to a *third* of the size of the mid-9th C collection of Isidore Mercator, likewise containing only straight canonical material.[162] And of course it goes without saying that this material is minuscule in comparison with the Talmud, or the secular Justinianic law corpus; the *Digest* alone is approximately 800 000 words.[163]

This distinction is equally evident in a canon-to-canon comparison. The eastern core corpus, as defined more or less definitively by the 883 recension, will contain approximately 770 canons. The shortest version of the early 7th C *Hibernensis* has roughly 1600 texts;[164] the systematic versions of the *Hispana* include approximately the same number;[165] Burchard's popular 11th C *Decretum* clocks in at 1783 items; Ivo's 11th C *Decretum* at 3760,[166] and the standard edition of Gratian (about half the 16th Roman Catholic corpus) is usually counted to contain about 3800 texts.[167] The division and nature of the texts and fragments in the western texts may not always be directly

[159] See n. 10 for editions. Uncertainty about the dating and completeness of the published scholia – many of which seem to be quite regularly copied, almost a small *glossa ordinaria* – have generally precluded our discussion of them in this work. See *Sbornik* 145, 161; *Sin* 22-23.
[160] See below section C.6.
[161] Estimated at ~260 000 words from the González 1808 edition.
[162] Estimated at ~500 000 words from the Hinschius 1863 edition.
[163] Honoré 1978,186.
[164] Reynolds 1986,403
[165] Gaudemet 1985,159
[166] Gaudemet 1993,83, 95.
[167] Gallagher 2002,158; Thompson 1993,xiii.

comparable with the relatively neat "canons" of the eastern collections, but the general disparity in size remains unmistakable.[168]

More comprehensive comparisons also reveal this difference. At the end of the empire, the full *NC14*, complete with secular material, prologues, corpus *and* the three 12th C commentators (i.e. most of *RP* 1-4, generously estimated at about 500 000 words) is a little over three-quarters the length of the Friedberg edition of Gratian's *Decretum* and the decretal collection of Gregory IX,[169] that is, about three-quarters the size of the effective core corpus of the medieval church in the later 13th C. If one were to make a closer like-for-like comparison, and include on the western side the post-Gregorian decretals, the ordinary glosses, and most of the major western commentators up until the 16th C, the difference would extend, I think, to at least a factor of ten, probably much more.

As a physical textual presence, then, the Byzantine canonical tradition is stable, conservative, and *small*.[170] Indeed, one can fit the full Byzantine nomocanonical corpus, plus the two most important commentators, and numerous appendices – in a sense, the majority of the tradition – in one manuscript.[171]

4. Autonomy

One of the simplest and most preliminary observations to be made of the extant Byzantine canonical tradition is that it constitutes a distinct and discrete physical textual tradition. That is, the tradition is mostly constituted by "canon law manuscripts", the sole, or at least predominate, content of which is canon law. As noted, the exact content of the extant manuscripts can vary, particularly in the appendices, but the basic structures and types of contents of canonical manuscripts – even aside from the corpora themselves – are sufficiently regular and similar that one can always easily identify a "canon law" manuscript from, say, a Scriptural, or theological, or philosophical manuscript. Rare indeed are manuscripts which profoundly mix proper canonical collections with other types of content – i.e. in which a substantial part of the manuscript is given over to one topic, and another part to canon law.[172] Manuscripts

[168] Isidore Mercator is counted at 10 000 fragments! Gaudemet 1993,32
[169] Conservatively estimated at ~650 000 words.
[170] Despite occasional comments to the contrary: Nichols 1992,416.
[171] So, for example, Florence Laur. 5.2 or Istanbul Topkapı 115. cf. Burgmann 2002,260.
[172] On the general "purity" of Byzantine juristic manuscripts, Burgmann 2002,263. It is particularly difficult to find an example of a manuscript that combines a major non-canonical work – say a scriptural commentary, or philosophical treatise – with a canonical collection. The few exceptions seem to prove the rule. See Appendix A (11) for examples.

containing church law are usually purpose-made *as* canon law manuscripts, and are recognizable as such.

Given earlier references in Chalcedon and Justinian to canons being read from "a book" or "books of the canons" and the relative absence of more mixed or miscellaneous manuscripts – and certainly of *traditions* of such mixed manuscripts – we may tentatively assume that this manuscript autonomy obtained quite early.[173] Future work on the earlier Latin and Syrian manuscript traditions may help further illuminate this question.

Only one consistent exception to this textual autonomy exists in the extant manuscripts: secular and ecclesiastical legal materials do regularly appear together, and not simply in the form of ecclesiastical secular regulation within the collections themselves. Often a major ecclesiastical canonical collection will contain as an appendix a handbook of general secular law or vice versa.[174] It is not clear if this pattern was evident before this 8th C, when the earliest Byzantine secular handbooks – the usual secular components – were first composed. Nevertheless, it seems that at least by the end of our period the Byzantine legal imagination could easily envision secular and ecclesiastical normative material sharing a common physical space.

The Byzantine canonical collections also display a degree of internal textual autonomy in their relatively unmixed disciplinary content. The earlier Apostolic church order traditions evince a tendency towards encyclopedism: doctrinal/exegetical, moral, liturgical and disciplinary texts are synthesized into one literary whole.[175] By contrast, in the imperial church, these threads tend to be developed as separable and distinct textual traditions. This independence does not mean that the canons will be written as "pure" legal or disciplinary rules in a modern scientific-juridical sense, cleanly separated from theology or morality; as we will see, quite to the contrary, they frequently make juridically "inappropriate" recourse to doctrinal, moral, and even liturgical, realities. But they are not extensively interwoven with lengthy liturgical, doctrinal or exegetical texts. They constitute a proprietary branch of the tradition.

5. Structure, order and patterns of growth in the corpus

[173] In Chalcedon the canons are frequently read from "a book", βίβλιον or βίβλος: ACO 2.1.3.48, 60, 95, 96, 100 (references from *Historike* 21-22). See *N.* 6.4 for τὰ βιβλία τῶν ἐκκλησιαστικῶν κανόνων.
[174] The most important of these are described in Burgmann et al. 1995; for examples of the former, Athos Meg. Lav. B.93, contains the *Coll14* with the *Ecloga*, and Oxford Laud 39 the *NC14* with the *Prochiron*.
[175] On the genre of the Apostolic church orders, see Steimer 1992,155-335, also Metzger 1985,1.33-54. The best example of such liturgical and disciplinary "mixing" is probably the *Didascalia apostolorum* (ed. Funk 1905).

The structure of the Byzantine corpus of canons is constituted chiefly through the ordering of its constituent sources (i.e. Nicaea, Ancyra, Neocaesarea, etc.). Witnesses to corpus orders may be found in five principal places: 1) actual orders of sources in manuscripts; 2) the order of sources cited under thematic rubrics in the systematic collections; 3) the orders mentioned in prologues, canons and external sources (e.g. Psellus or John of Damascus' references); 4) the orders of sources in manuscript tables of contents; 5) and the orders of sources in synoptic or later commentary works. It is generally assumed that the source orders of the last four types of texts represent real physical corpus configurations that at some point existed, and that have later been "frozen" in the textual tradition. Whether this is always strictly true or not, certainly such witnesses at least suggest a structure which someone thought should exist or could exist. Taken together, all can be read as a series of witnesses into different stages of how the corpus developed over time as a concept and a text.

Four fundamental patterns may be discerned from these witnesses.

The first is less of a pattern than a constituent characteristic: the corpus *is* structured by sources. This may seem to be a banal point, but it is extremely important. The canons do not exist in the tradition as disembodied norms or abstracted rules. Instead, rules are consistently designated according to their original source: canon 2 *of Nicaea*; canon 4 *of Gregory of Nyssa.* The canons are always issuing from the mouth of their original legislators. The corpus as a whole thus always emerges as very much a self-conscious accumulation and compilation of traditional sources of canonical legislation. In this sense, it is broadly *florilegic* in character*:* it is a collection of traditional authorities on matters of church discipline.[176] In this respect the Byzantine corpus is quite unlike modern codes in which rules, deriving their authority from the *issuer* of the code, exist as more or less anonymous and rootless norms, and are easily subject to various levels of manipulation, reorganization and rationalization – and are easily modified, added or deleted. The Byzantine instinct is instead always to keep the corpus as a collection of traditional sources which are maintained more or less in their original integrity.[177] The authority of the sources seems to be linked to their issuance from their original, traditional source.

[176] cf. Gallagher 2002,39-40. This tendency is enforced by the practice in some manuscripts of including short ὑποθέσεις before the listing of each source's canons (most notably Beneshevich's Group A recension of the *Coll50*, *Sin* 26-69). These ὑποθέσεις, of varying length, give various historical details about the council in question, and occasionally, of the father. In the 12th C commentators, similar introductory comments can extend into sizable paragraphs.

[177] For two apparent exceptions to this rule, see Appendix A (12).

This general allergy to abstracting and presenting rules as detached from their traditional sources is also shared by the civil legal tradition. The constitutions in the *CTh* and the *CJ* all retain attributions to their original legislators from whom they derive their continuing authority. More surprisingly, even the fragments of the *Digest*, which are explicitly given their authority by Justinian, as if issuing from his own mouth,[178] are still scrupulously sourced to their original (mostly pagan) authors – and so even in the Basilica.[179] The only real exception in the *CTh*/*CJC* literature is the *Institutes*: but it is merely a pedagogical handbook *to* the real corpus. Real legislation always remains explicitly connected to traditional sources. Legal work in late antiquity is everywhere broadly florilegic – certainly compilative.[180]

The second pattern of structuring, already noted at length, is the basic mechanism of growth in the tradition: accumulation. The structure of the corpus always reveals that one always only *adds* new material on top of older material. New material thus almost never physically replaces or ejects older material: older material, once well established in the corpus, is eternal.[181] Older rules may fall out of use, and be clearly marked and recognized as such, but traditional sources, and even parts of sources, never actually leave. We may term this phenomenon "corpus persistence". A similar, if weaker, dynamic, has also been occasionally observed in Byzantine secular legal literature.[182]

Third, the ordering of the corpus evinces an ongoing dialectic between hierarchical and chronological ordering. In the extant witnesses, the default ordering strategy is clearly chronological, just as it is in the disposition of laws under titles in the imperial codices, or, for the most part, in the Florentine index of the *Digest* sources.[183] This default is nevertheless regularly violated, and each violation may be read as

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[178] *Deo auctore* 6
[179] And in the *Digest*, quite explicitly on account of "reverence for antiquity": see *Tanta* 10.
[180] The preservative and compilative nature of late antique law is a commonplace of late antique source histories. See for example Pieler 1997a,566-567, 580 (where he calls the *Digest* a "Florilegium of ius"), 591; see also the related narrative of (eastern) late antiquity's conservative and classicizing legal *Geist*, Kunkel 1966,153-154; Schulz 1953,278-285; Wieacker 1988,2.263-266. These tendencies should be understood within the context of the broader late antique and Byzantine cultural penchant – almost cognitive tendency – for compilation and preservation. See, for a variety of contexts and periods, Aerts 1997a,648-649; Jenkins 1953,47-50; Lemerle 1971; Louth 2002; Maas 2005a,18-20; Odorico 1-7 (with a critical review of older literature on Byzantine "encyclopedism").
[181] The *idea* of "cleaning" the corpus is perhaps not altogether absent or impossible; see Appendix A (13).
[182] See particularly the discussions of the lack of functioning abrogation principles; references in Introduction n. 44. Lokin 1994,82 astutely compares this tendency towards legal accumulation, with its lack of a functioning derogation model, to the accumulation of church dogmas
[183] Published in *Digest* xxx-xxxii.

conveying some ideological message about the nature of the sources.[184] This hierarchization represents one of the very few ways in which the Byzantine corpus suffers – although quite superficially – a kind of systematic rationalization.

The first and prototypical violation, made at the tradition's onset, is the prefacing of the Antiochian corpus with the Nicene canons, despite the fact that Ancyra and Neocaesarea were known to be older. This is a very conscious, and explicitly marked move, as already noted, and clearly indicated the Nicene "take-over" of the collection. No Greek manuscript witness exists to the corpus without this modification.[185]

The next consistent violation will be the relegation of Serdica (341) and Carthage (419) to after Chalcedon (451) in the expanded Nicene corpus. This is their standard position in the extant recensions of the *Coll14*, and the later tradition, and finds resonance in older western and Syrian collections.[186] The *Coll50* however placed Serdica in its chronological position, following Neocaesarea, and thus "within" the core Nicene collection. In the *Coll14*, the subordinate placement of these councils is explicitly glossed as a relegation or marginalization.[187]

The third violation is the placing of all patristic material after the conciliar material.[188] The former is clearly subordinate to the latter, as made explicit in the first *Coll14* prologue.[189] At no point in the Byzantine tradition is the rule material thus considered so homogenous and generic that a true chronological corpus emerges in which the councils and patristic material are mixed in chronological order (e.g. Ancyra, Neocaesarea, Peter, Nicaea, Athanasius, Gangra, Antioch, Basil, Laodicea, etc.). The

[184] As probably true for the privileging of Julian and Papinian on the Florentine list: the former is privileged as providing the model *digesta*, the latter as simply a particularly respected jurist. Schulz 1953,145,319.
[185] The only exception is perhaps Blastares' survey of the sources in his *Syntagma* (1335; RP 6.6-26), but this is an historical treatment, akin to synodical histories, not a listing of the corpus *per se*. The east Syrian tradition, however, does later move Nicaea back into its chronological place. Selb 1981,88,107.
[186] Thus they appear in more marginal locations in the Syrian *synodika* (see Selb 1981,104-110; 1989,92-102, 140-145), and both are post-positioned after Chalcedon in Dionysius II, while in the non-extant Dionysius III both were apparently omitted explicitly because of doubts about their universal acceptance ("*quos non admisit universitas*"; see Preface III, Somerville and Brasington 1998,49).
[187] On account of their "local" western content: ἡ δὲ ἐν Σαρδικῇ καὶ ἐν Καρθαγένῃ τῷ χρόνῳ τινῶν τῶν λοιπῶν συνόδων προτερεύουσαι, μετ᾽ αὐτὰς ἐτέθησαν διὰ τὸ πολλὰ περί τινων ἐπιχωρίων ἤγουν τῶν δυτικῶν μερῶν διορίσασθαι. (In the scholion ἰστέον to the table of contents of the *Coll14*; RP 1.12)
[188] Tarasius, however, generally follows II Nicaea in the manuscripts.
[189] *RP* 1.6.

patristic material itself tends to be arranged chronologically, however, as in Trullo 2, but other orders, sometimes evading explanation, are not unknown.[190]

The fourth major violation is the movement of all later ecumenical conciliar material to a position immediately following Nicaea – i.e. before the older Antiochian corpus sources. This may be understood as another aspect of the general tendency to assimilate ecumenical material to Nicaea, and as an extension of the original Nicene prefacing. Its effect is to create a new hierarchical distinction between "general" and "local" councils. In the Greek tradition, this ordering is first certainly witnessed in II Nicaea 1 (787) and the recension Beneshevich associates with this council (the "Tarasian" or "systematic").[191] It becomes a regular order in the manuscripts only with Zonaras and Balsamon, although even in these manuscripts it never entirely ousts the more traditional order of the *Coll14* source listings (as found in Trullo 2 and the traditional table of contents of the *Coll50* and *Coll14*) in which the later ecumenical councils usually follow Constantinople and Chalcedon, which themselves follow Laodicea.[192] The result is that very often the two orders (or even more) co-exist together in the same manuscript – "piled" on top of each other – with the older order in the prologues and systematic references, and the newer one in the corpus itself.[193]

The fourth major structural dialectic, and the most complex, is that between core material and appendix material. This dialectic, implicit in our discussion until now, is a phenomenon by which at any given moment one group of canons is marked as particularly standard, central and inviolable *versus* other material in the collection or manuscript that is marked as newer, more peripheral, variable, and perhaps optional – i.e. more appendix-like. It is never a concept that is articulated doctrinally, nor does it lend itself to precise definition, but it nevertheless constitutes a consistent, tangible and essential part of the tradition as a whole. It tends to emerge as a graded and diffuse spectrum of implied worth and value – rather as multiple concentric rings, each fading into the next – indicated by a wide variety of markers. Although the exact boundaries between different "levels" of sources can be blurry, it allows one at any given moment

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[190] Joannou offers a brief survey, *Fonti* 2.xix-xx. For an example of an order by rank of see, Coislin 364 (described *Sin* 160-161); for an order in which Basil is favoured, but otherwise the rationale for the order is difficult to discern, see Rome Vallic. F. 47 (described *Sbornik* 266-7).

[191] The relevant section of II Nicaea 1 reads ..τοὺς θείους κανόνας ἐνστερνιζόμεθα...τῶν πανευφήμων ἀποστόλων, τῶν τε ἕξ ἁγίων οἰκουμενικῶν συνόδων καὶ τῶν τοπικῶς συναθροισθεισῶν ἐπὶ ἐκδόσει τοιούτων διαταγμάτων καὶ τῶν ἁγίων πατέρων ἡμῶν... The four-council order of the synopsis tradition associated with Symeon Magister may, however, represent an earlier version of this ordering strategy.

[192] Thus, for example, in manuscripts of the Tarasian recension, as edited in Beneshevich's *Kormchaya*.

[193] On this, see Stolte 1994,187.

to identify at least some material that is clearly of the "core" and some that is not. It subsumes and presumes the dynamics of accumulation and hierarchization.

The markers of the core material are numerous, and change over time. All consciously or unconsciously function to distinguish some types of material from others. They often overlap and contradict each other, which produces the impression of a highly nuanced, graded spectrum of sources: some sources are "marked" as core in one way, and not in others. The main markers are as follows:

- numbering schemes which differentiate older core and additions
- presence and position of sources in prologues
- presence and position of sources in manuscript tables of contents
- presence and position of sources in systematic references
- presence and position of sources in definition canons (i.e. Trullo 2 and II Nicaea 1)
- mentions in other literature
- presence and position in manuscripts themselves

The very earliest traces of this phenomenon may be detected in the use of continuous numbering in the original Nicene (and probably Antiochian) corpus, highlighted above. Here an earlier "core" of material is demarcated by continuous numbering. Newer material appear with individual numbering, quite obviously marked as tacked-on or added: appendix-like, at least in appearance. Eventually this material too is subsumed by the continuous numbering, in effect assimilated into the core.

In the 6th C, the continuous numbering system falls out of use in the Greek world, but a number of other signals now indicate core material. Thus the prologue of the *Coll50* refers clearly, and quite casually, to what is already an established core structure; so much so in fact, that it even has a name: the "Ten Synods".[194] The sources included in this "Ten Synods" are enumerated in the *Coll50*s corpus τάξις τῶν συνόδων. To this core it prefaces the Apostolic canons – apparently already a standard addition – and post-fixes the Basilian canons. The result is a three-stage corpus: first and foremost the Apostles, outside of the synodal list, which here probably implies precedence, an almost qualitative difference; then the neatly sealed Ten Synods; then, again outside of the synodal list, Basil –here almost certainly implying subordination.

The introductory structures of the *Coll14* also reference the Ten Synods as a standard core of canons, and then goes on to give a relatively long explanation for its major additions, including (very briefly) the Apostles, the "council" of Carthage, and a

[194] See chapter 2.A.3.

large number of other fathers.[195] Both in the prologue itself, with its differentiation of the material (Ten Synods taken for granted; Apostles virtually for granted; Carthage and fathers in need of explanation), and in the traditional listing, the πίναξ, where Carthage, Serdica, and the fathers are placed after the older Apostles + Ten Synod core, a clear sense of core and "new core" material is again evident.

This pattern carries through in the patterns of referencing under the thematic titles of the *Coll14*. As already alluded to, the original *Coll14* seems to have carefully cited every canon of the older core Apostotlic + Ten Synods + 68 canons of Basil – i.e. the *Coll50* core. The only "selection" is in the newest stratum of material just attached to the core by the *Coll14* author himself, i.e. in Carthage and the first letter of Basil. This material is thus again subtly "downgraded". Later, this material will be added back into the *Coll14* references – it has achieved higher "core" status.

Other patterns of core-appendix marking may then be found in the slow processes of corpus expansion evident in the later recensions of the *Coll14* (and *Coll50*). (Indeed, the recensions have been recoverable chiefly because the manuscripts contain different fossilized orderings of the corpus sources such that the newest sources are obviously outside an older "core", i.e. recensional form.) Only gradually are the new sources admitted into the older cores, slowly moving up through the hierarchy of sources – which thus emerge as yet more inner rings within the core.

The fortunes of Trullo in the manuscripts provide the best illustration. In the very earliest witnesses, Trullo appears physically virtually outside of the corpus, *even after the patristic material.*[196] Later, however, it may be found to have leapt in front of the patristic material, but still after all the earlier conciliar material, even the relegated Serdica and Carthage (and Constantinople 394).[197] This position will become its classical *Coll14* position; it has a difficult time penetrating beyond this earlier core structure. Nevertheless, in a few manuscripts attempts are made to do precisely this. In Venice Nan. 226, for example, Trullo is now pushed before Carthage (Serdica remains in the *Coll50* place). Similarly, in Oxford Barocc. 26 Trullo is placed after Serdica, but before Carthage, and in Venice Bessarion 171 Trullo is placed immediately after Chalcedon (extremely unusually, Serdica and Carthage are here simply omitted).[198]

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[195] See chapter 2.A.4.
[196] Beneshevich's First Redaction, (*Sbornik* 230-242); so similarly the Synopsis attributed to Symeon the Logothete, above, and also the corpus references in Beneshevich's *Coll14* index to the Tarasian recension (*Kormchaya*).
[197] Beneshevich's Laudanian and Coislin redactions (*Sbornik* 177-188, 188-191).
[198] *Sbornik* 313-321.

These attempts may be viewed as experimental – they do not catch on. Nevertheless they demonstrate attempts to "push" Trullo more clearly into the core. Only with the hierarchical rearrangement of the corpus, in Beneshevich's Tarasian recension, will Trullo, as one of the general councils, finally physically appear right after Chalcedon – with all other councils following it. Trullo has "made it" into the core of the core.[199]

Similar "journeys to the core" may be suspected for II Nicaea and the Photian councils. For the former, in Oxford Laud. 39, which seems to contain one of the oldest recensions (and which is perhaps a 10th C manuscript), one finds II Nicaea separated from Trullo (which it usually accompanies) by Cyprian.[200] In contrast, in another recension, Beneshevich's *Partes Distributa*, Cyprian has been gently pushed after II Nicaea.[201] Protodeutera and Hagia Sophia also take some time to be accepted into the collections – and the latter never seems fully integrated. Both are mentioned in the 883 prologue to the *Coll14*, but are missing, for example, in Oxford Baroc. 26, Rawl. G.1.58 (both 11th C). In Vatican 2198 both are present but following Cyprian (after II Nicaea). Hagia Sophia, in particular, is often absent, for example in Vienna hist gr. 56 (a. 1000), or Oxford Baroc. 196 (11th C). In Athos Iver. 302 (14th C) Hagia Sophia is found, but curiously after Gennadius, which is after Protodeutera. Hagia Sophia in fact never seems to make it into the table of contents of even the Photian redaction, and only sometime later, certainly by the 11th C, do references to it enter the *Coll14* titles.[202] In the 12th C Aristenos still does not offer commentary on either council. These councils are thus not quite "marked" as sufficiently core material. This only happens, it seems, with the commentators.

This gradual movement of material into the core is very curious. One might expect that one chance 7th C manuscripts might survive showing, for example, Trullo tacked on after the corpus for purely practical reasons – the newest legislation was simply added to existing manuscripts. But the fact that these manuscripts are much more recent and contain plenty of material following Trullo (II Nicaea, Protodeutera, etc.) indicate that Trullo is being left in a subordinate positions more intentionally. It would have been exceptionally easy to have moved Trullo to a more prominent position in the corpus, perhaps after Chalcedon, or certainly before the fathers, in every subsequent manuscript recopying since the late 7th C. Instead, a much more hesitant,

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[199] *Sbornik* 288-307.
[200] *Sbornik* 177-188.
[201] *Sbornik* 192-199.
[202] *Sbornik* 96-100. *Pitra* 2.450 does note one later manuscript (Vatican Barb. 568) that includes Hagia Sophia in the *Coll14* table of contents.

conservative and gradual process of digestion and consensus-building is evident in which the new material seems to pass through a succession of strata before it is absolutely evidently part of the older core.

Similar conservatism may be remarked in the persistence of the original *Coll50* core. As already noted, from a number of external references it seems to have remained a highly impermeable "core of the core" in the tradition for some time, long after the introduction of the *Coll14* core. This is even evident within its own manuscript tradition in which later councils are usually only tacked on after the systematic rearrangement of the corpus itself, thus visually marking a distinct difference between the original material – placed under the titles – and the later additions. Also, as we just saw, the *Coll14* itself witnesses to the *Coll50* core as an established authority, adopting it wholesale, and carefully not selecting amongst its canons in its topical references. The *Coll50*s ordering of the pre-6th C material, save only the location of Serdica, will also always be preserved in the πίναξ of the *Coll14*, even when the canons themselves will be rearranged in the manuscripts into the hierarchical general-local order.

Both of the two principal corpus "definition" canons of the Byzantine tradition (Trullo 2 and II Nicaea 1) also obliquely evince a sense of the existence of a core corpus. Both list the traditional corpus, *but do not include their own regulations in the listing*. They thus make an implicit distinction between 1) the core, traditional corpus, and 2) their new canons. The latter are presented as immediately following on from and faithful to the former – which seems to precisely mirror their position in the earliest recensions: right up against the older core, but outside of it.

As noted, the corpus of the 883 recension will ultimately ossify into the definitive core of the tradition. Its status will ultimately be marked mostly by the hesitation of later recensions to add any more items to the *Coll14's* πίναξ or thematic references and a general change in the genre of later legislative material from synodal canons to synodal decrees. The decision of the commentators to comment almost exclusively on this core will become a decisive marking of this core. However, the boundaries between a given core and its appendix material are always fluid, and this will always be true of the 883 corpus. (The exact delineation of the 883 core is mostly a modern preoccupation.[203]) Thus the Michael/Theodore recensions recognize the 883 recension as definitive, but they also consider that the material of the Apostolic Epitome

[203] For example, *Historike* 91-100.

should be part of it.[204] As already noted, even the two major commentators will commentate on slightly different corpora (and Aristenos' is quite different). Physically, in the manuscripts, some material that is generally "in", such as Cyprian, Gregory Nazianzen, and Amphilochius in fact tend to flit in and out of the manuscripts and indices, while material that is generally "out" can sometimes appear to enter the core. For example, the ἀποκρίσεις of Patriarch Nicholas, or the penitential canons of John the Faster or Nikephoros the Confessor, which become fairly regular appendix items in the later tradition, and often can be found following directly on the more traditional patristic material, can very occasionally be added under some systematic rubrics.[205] Similarly, Balsamon seems to have commented on the ἀποκρίσεις of Patriarch Nicholas.[206] A certain amount of material thus emerges as a kind of transitional material – it is either in the outer valence of the core, or the innermost stratum of the appendix material. It is "in" by the measure of some markers, or "out" by the measure of others.

Similar core-boundary "blurriness" may be detected earlier in all of the various instances of "softness" we have noted: Serdica and Carthage, the non-Basilian fathers, or even, at first, Trullo and the rest of the second-wave material.

Finally, the blurriness in defining the corpus is reflected in the physical layout of the manuscripts. In my sampling of manuscripts core material is not clearly and consistently distinguished from non-core material with, for example, an exceptionally dramatic bar-design or page break, or any other change of layout or style. Until one reads a manuscript with the commentators – where the cessation of commentary is quite obvious – the manuscripts shift very smoothly from core to appendix. The core is instead marked by the prologues and their corpus listings, the systematic references, and often a genre-switch in the manuscripts (e.g. from the canons to the civil law appendices, and then back to paracanonical ecclesiastical material).

6. Is something missing? The problem of official definition, jurisprudence and professionalization

The phenomenon of core-formation may be understood as a very diffuse form of rule-recognition. That is, it is the mechanism by which the tradition slowly establishes consensus around the definition of "valid" law. This very diffuse form of rule-

[204] In the longer prologue, text in Schminck 1998,361
[205] For an example of the latter, see *Sbornik* 252. Nikodemos, by including them in the Pedalion (Kallivourtsis 1800), is thus following an old tendency in the manuscripts.
[206] *RP* 4.417-426; but see p. 417 n.1.

recognition by turns reflects, explains, and perhaps enforces, the strikingly tenuous and desultory role of one very essential and normal element of most modern positivists theories of law: the assertion of a clear "official" authority to define the valid law.[207]

Only once in the canonical tradition does something approaching a detailed official definition emerge: Trullo 2.[208] It, however, can only very awkwardly and indirectly be cast as an exercise of true sovereign authority *over* the law, i.e. as an act of official definition of law in its strongest (modern) positivist sense.

First, although rarely noted, the canon is primarily addressed to a very specific problem – the status of the Apostolic Constitutions in the corpus – and not to corpus definition *per se*. The lengthy corpus delineation itself reads as almost an after-thought, and should probably be understood as a consequence of the broader problem raised by the Apostolic Constitutions: the intrusion into the corpus of pseudepigraphal and false material. This concern is precisely the focus of the canon's conclusion,[209] and is how the synopsist reads the canon – he does not even mention the corpus listing.[210] The canon is not therefore so much creatively or actively defining the law as a whole, as clarifying the mainstream tradition (which already has authority) and tidying up around its edges in light of specific problems.

Second, as is often noted, its corpus delineation is little other than an unremarkable *confirmation* of a corpus that had been in existence for at least a century: it seems more or less to read down the corpus list of the *Coll14*, as it stood in the late 7th C.[211] The only thing it may be adding is Cyprian, since it goes out of its way to justify and explain its presence; but even this canon seems to have been in the tradition earlier, as already noted. Most likely it is simply confirming the place of Cyprian along with a few other peripheral patristic sources. Its general content and tone is thus almost entirely

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[207] This lack of a clear moment of official definition of the eastern corpus so upset 19th C canonists (educated in modern civil and western canon law) that they invented one ("920"). See Appendix A (14).
[208] The definition in Chalcedon 1 is probably specific in intention, but not in form; II Nicaea 1 does little more than list the major types of legislation. Only one other more specific definition exists in the tradition, Novel 131.1, which confirms the dogmatic definitions and canons of the first four councils. It is updated in the 9th C in *Basilica* 5.3.2 to include the seven ecumenical councils. Even this imperial definition, however, is 1) not especially comprehensive; 2) it reads as only secondarily directed towards confirming the canons; 3) and it is mostly confirmatory in character: it sanctions and approves realities already established. There is also little evidence in the texts that it played a particularly important role in defining the shape of the corpus *per se* – in particular, it is surprising how rare a four-council core structure, implied in Novel 131.1, is in the eastern tradition. Of course it undoubtedly *contributed* to the corpus' definition, and may be read as another "marker" of the core.
[209] ...καὶ μηδενὶ ἐξεῖναι τοὺς προδηλωθέντας παραχαράττειν κανόνας ἢ ἀθετεῖν ἢ ἑτέρους παρὰ τοὺς προκειμένους παραδέχεσθαι κανόνας ψευδεπιγράφως ὑπό τινων συντεθέντας τῶν τὴν ἀλήθειαν καηπηλεύειν ἐπιχειρησάντων.
[210] *RP* 2.311-312; so Aristenos.
[211] For example, *Delineatio* 69-70; *Historike* 73-74; Ohme 2006,32-33.

traditional and deferential, "sealing" what has gone before.[212] Although it may be attempting to bolster the authority of the *Coll14* additions vis-à-vis the older *Coll50* core, or simply to clarify the general tradition, it is certainly not working to modify or dramatically shape this tradition, and it is not granting authority to something that had none before. It is thus more recognizing the law than actively defining it: *contributing*, perhaps, to a broader process of definition and delineation, and further heightening and sharpening a previous growing consensus.

In fact, the canon's function is probably best read as garnering support for Trullo's own legislation: it is above all a proclamation of Trullo's fidelity to the canons, and thus the legitimacy of its own canons – and not the canons' dependency upon its sovereign legislative "approval".[213] Trullo is seeking the canons' approval, not the other way around. It is above all a statement of allegiance to the established tradition.[214]

The most important "strike", however, against reading Trullo 2 as a definitive and categorical official definition of the law is simply its lack of influence on the tradition as a whole. It will never, for example, mark a particularly definitive corpus-boundary (i.e. there are few witnesses which embody the Trullo list as a definitive and obvious core[215]), and indeed the manuscripts and recensions often ignore its exact list and order of patristic fathers, its addition of Cyprian, and its prohibition of any other Apostolic material aside from the Apostolic canons. Certainly when the final shape of the core corpus does emerge, as we have seen, it is defined not by Trullo (or II Nicaea 1) but by a later anonymous recension of the *Coll14*. Finally, as we have seen, many much later listings of the "the canons" hail more to the *Coll50*, and not the *Coll14* at all,

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[212] The key dispositive, ἐπισφραγίζω (ἐπισφραγίζομεν δὲ καὶ τοὺς λοιποὺς πάντας ἱεροὺς κανόνας...) can denote "ratify" – in the sense of putting into active force – but it can also simply mean seal in the sense of "confirm" or "recognize". (In the corpus, for something approaching the former, see Constantinople I Προσφωνητικός in *Kormchaya* 95; for the latter Carthage 55; see Liddell-Scott 663; Lampe 536-537) In the context of the previous canon, however, to which canon 2 is clearly written as an addition (ἔδοξεν δὲ καὶ τοῦτο τῇ ἁγίᾳ ταύτῃ συνόδῳ...), the latter meaning is much more natural: just as Trullo 1 proclaims its allegiance to the traditional doctrinal definitions of the church, so now the council proclaims its allegiance to the church's canonical traditions. Trullo 2 is thus no more truly putting into force or "defining" the canons than canon 1 is putting into force or defining the older doctrinal decisions. It is proclaiming its allegiance to them. Critically, in fact, Trullo 1 uses the term, among others, ἐπισφραγίζω, to "confirm" the older doctrines.

[213] Some modern Orthodox canonists, influenced by modern civil law doctrine, have been included to read in Trullo the affirmation of the positivist action of the absolute sovereign legislative authority of the ecumenical council (e.g. Archontonis 1970,20-21; Christopoulos 1976,255-266; Gavardinas 1998,136-138). This is not the council's intention; see Appendix A (15).

[214] See further chapter 2.B.4.

[215] That is, that contain the following corpus: Apostles, Nicene Corpus to Chalcedon, Constantinople 394, Serdica, Carthage, the Trullan patristic list, and *then* Trullo and later councils. Patmos 172 is very close.

in any form, including Trullo! In short, no one seems to have been reading this canon as *the* "official" statement of the tradition.

Some scholars have recently seen this curious lack of "official" effect as evidence for Trullo's late or tenuous reception into Byzantine canon law, and have suggested that Trullo was not truly in force until as late as the 12th C.[216] We must be careful, however, about imposing an excessively – and anachronistically – categorical and bivalent sense of legal validity and enactment, i.e. the idea that an a source is either absolutely in force, or absolutely not, and that this is status is meant to have immediate, consistent, and system-wide consequences – and that a particular person or organ can determine this. This presumes a concept of a definitive, positive definition of the valid and in-force law. It is much preferable, however, to recognize that categorical, authoritative "official" statements of the law are simply not part of the Byzantine canonical legal imagination – indeed they do not seem to be clearly a part of anyone's canonical-legal imagination before the high middle ages[217] – and that "validity" in this world appears much more as a graded and fuzzy calculus of traditional weighting.[218] In this case, Trullo's effect and fortunes are perfectly normal, and even to be expected. New material, whatever its source, always starts outside the core of fully recognized traditional material, and needs to slowly work its way in. In this sense it is true that Trullo is not fully "accepted" until the 12th C – i.e. it is not absolutely clearly seen as itself expressive of the tradition until this point. But this does not mean that Trullo was not "accepted" *per se* as a real imperial ecumenical council, or that it had no canonical authority (any more than would be true for the early papal decretals in the west, on account of their variability in the manuscripts). The evidence is quite the opposite.[219]

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[216] *Sources* Fathers; *Fonti* 2.xv-xx; Ohme 1990,332-44; 2006,34. The background of this assertion is the interminable discussion of the "ecumenicity" of Trullo.

[217] "Prior to the thirteenth century, the very idea of a canonical compilation drawing its authority from a formal act of sovereign approval seems not even to have entered the mind of popes and canonists alike..." Kuttner 1947,387. The seeds of this new idea are perhaps to be found in the Gregorian concern for the papal approval of genuine church legislation, as Kuttner goes on to discuss. The first moment when a collection appears quite explicitly and certainly to have received some kind of "official" approval is Innocent III's confirmation of the *compilatio tertia* of Peter Collivacina in 1209/10; the first collection composed by official order seems to be Honorius III's *compilatio quinta* (1226). See Pennington 2008,309-312. Gratian, however, is not formally promulgated until the 16th C.

[218] Cf. Burgmann 2003,252 n. 13, where it is noted that different *levels* of "officialness" could be encountered in the Byzantine secular collections. The traditional distinction between "official" and "private" collections is Byzantine secular law is now increasingly questioned. See Appendix A (16).

[219] For example, its citation in II Nicaea, in Leo's Novels, in citations at 861; see Dura 1995, Troianos 1995. In the west it seems that serious objections to Trullo's validity as a whole were not raised until the Gregorian reforms – and even afterwards the council sees a scattered reception (e.g. in Gratian). *Sources* Trullo; Laurent 1965,28-39.

By virtue of its newness, it is simply, and quite normally, a "softer" point in the tradition for some time. And so with its definition.

In sum, therefore, instead of a clear positivist action of sovereign legislative authority, a very different, much more diffuse – but no less real or effective – method of rule recognition seems to have been operative in the Byzantine canonical tradition. In trying to find a theoretical formulation for this method, Rudolph Sohm long ago put his finger precisely on the central assumption of this system: in this world, authoritative positive legislators do exist, *but only in the past*.[220] Only after a period of time can legislation become clearly recognized as absolutely authoritative. Phrased differently, tradition itself is the only real sovereign positive agent; only it has categorical rule-recognition authority. As such, nothing *today* can acquire absolute recognition – no one living has authority *over* the rules. Instead, consensus must slowly build to reveal eventually the authority that "was" present in this or that legislative process. In practice, this process is thus very diffuse and seemingly almost unconscious. Curiously, the manuscript tradition itself seems to function as its most direct practical agent. Copy after copy, recension after recension, "the corpus" is slowly, and constantly, formed and defined.

The curious lack of instances of clear official positive definition of the canonical sources points to a much broader and more conspicuous absence in the textual shape of the tradition: jurisprudence. Largely missing in Byzantine canon is a literature of the technical juristic discussion of the rules, their principles, their underlying concepts, and their relationships with each other.

Evidence of canonical jurisprudential activity *per se* is not hard to find.[221] Indeed, it is present in the canons themselves. As we will see in chapter three, canons can sometimes be written in almost commentary-like style on older regulations, and can analyze in detail fine points of the nature and application of specific rules.[222] This material itself may cautiously be considered instances of a very desultory "jurisprudential" literature.

Outside the canons themselves, the thematic collections and the synopsis also represent, as we will see, a modest level of jurisprudential production. The former

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[220] Sohm 1923,2.75-77.

[221] Unquestionably the early episcopal courts, attached to the civilian system, had constant contact with broader secular jurisprudential processes. On the *episcopalis audientia* generally, see now especially Harries 1999,172-211 and Humfress 2007,153-173; also Wenger 1955,337-344. On the gathering of episcopal judgments as precedents, see Garnsey and Humfress 2001,77-78.

[222] See esp. chapter 3.D.1.

involve some sorting and classification, for example, and the latter do involve paraphrasing the canons. The extant scholia, if not all (or even mostly) within our period, witness to an ongoing process of explanation, reflection and even dissection on the canons as a coherent of rules. At the very end of our period, Photius produces a set of canonical question-and-answer,[223] and, just after our period, Arethas writes two short treatises on the transfer of bishops.[224] Earlier, Theodore of Studite had composed a number of letters that are more or less canonical answers.[225] A small work on the election of bishops, attributed to a certain Euthymius of Sardis, may also date to the early 9th C.[226]

But this production is very small, and hardly constitutes a sophisticated and sustained project – certainly not a literature. Unquestionably it pales in comparison with the extensive and advanced commentary work of the secular antecessors of the 6th C, which seems to have included a number of different genres of lectures, paraphrases, and case-examinations – to say nothing of the classical jurists[227] It is not even as creative or pronounced as the much more modest 7th-9th C Byzantine civil jurisprudential activity, which still sees the development of comparatively creative and novel manuals, compilations and even monographs.[228] If similar technical-juristic conversations around the canons were taking place, they have certainly not left much of a trace.

The material that is extant is also usually fairly practical and simple, hardly going much beyond clarification, indexing and cross-referencing. Even the jurisprudence embedded in the patristic material and second-wave legislation does not emerge as in any way a sustained "scientific" or systematic jurisprudential endeavour. It seems much more *ad hoc*, employed to deal with a problem or two, but not part of a continued and sustained methodological enterprise.

This early absence of jurisprudential literature is thrown into particularly high relief by its later emergence. In the 12th C, in particular, a sustained jurisprudential

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[223] Grumel 1972-1991, #531, 539, 540, 542, 545. See *Peges* 253, also 154-156, 251, 256; Troianos 2003,763.
[224] Ed.Westerink 1968,1.246-251. *Peges* 256.
[225] Epistles 40, 487, 489, 525, 535, 549, 552 (ed. Fatouros 1992). Troianos 2003,763.
[226] Ed. Darrouzès 1966,108-115. *Peges* 156, 256.
[227] On the antecessors, the Greek schools, and their methods, Collinet 1925,243-256; Pringsheim 1921; Scheltema 1970; van der Wal 1953.
[228] *Delineatio* 63-66, 71-76, 78-87; Pieler 1978,434-444, 452-469; Zepos 1958.

literature does emerge in the shape of three corpus commentaries.[229] These join a number of increasingly detailed question-and-answer material and canon-legal monographs that had been growing in number throughout the 11th C.[230] Later practical handbooks and manuals also exhibit more creative patterns of selection and ordering, more in line with later Byzantine trends of excerpting and epitomizing.[231] There is no question that Byzantine canon law does eventually acquire a kind of secondary literature of formal rule-commentary and rule-reasoning – even if never extensive or sophisticated in comparison to the post-12th C west.

In light of this later development, the earlier jurisprudential silence becomes almost deafening. The sudden 12th C flurry of commentary work is particularly mysterious: why now and not earlier? It is hard to imagine that the need to explain some of the archaic canons of, for example, Ancyra or Carthage, was so much more pressing in the 12th C than the 9th C – or even the 6th C. Further, the 6th C Justinianic and 9th C Macedonian spurts of secular legal activity surely recommend themselves as at least as obvious moments for the stimulation of a real canonical jurisprudential literature as the (relatively obscure) 11th C revival in secular legal learning the presumably underlay the 12th canonical work.[232] Most critically, the canons themselves give evidence that canonical jurisprudential thinking and activity *was* taking place during these earlier periods, and there is every reason to believe that, on the model of the 6th C and 9th C literature, it could have if anything been more sophisticated and involved than what later emerged. But if it existed it simply did not form itself into a lasting and distinct literature, a regular component of the tradition. The canonical tradition in our period overwhelmingly presents itself as simply a series of primary rules: a secondary discourse *around* these rules, although evidently occurring, does not textually congeal in a significant way.

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[229] Overview in *Delineatio* 108-112 and *Peges* 249-270 (see this last especially on the "fourth" commentary, a reworking of Balsamon). The only monograph remains Kraznozhen 1911. See also Gallagher 2002, Pieler 1991, Stevens 1969, Stolte 1989, 1991, 1991a.

[230] *Peges* 250-258, 303-306, 308-315 gives the most recent and thorough survey; see also for further references to the older literature Beck 1977,598-601, 655-662.

[231] The best examples are the two 14th C collections, the *Syntagma* of Blastares (in *RP* 6) and the *Epitome* of Harmenopoulos (*PG* 150.45-168). The former adopts a method of organization known from earlier civil-law works (alphabetical listing of subjects; as found in the secular *Synopsis Major* and *Synopsis Minor*) and the latter proceeds through an exceptionally regular and rational progression of subjects.

[232] On the 11th C revival see Angold 1994; *Delineatio* 98-104; Macrides 1990,68; Wolska-Conus 1976, 1979.

This lack of a distinct jurisprudential literature is undoubtedly connected to another gaping hole in the "shape" of early Byzantine canon law: professionalization.[233] This is one of the few socio-political realities of Byzantine canon law to be broached in this work, but it is essential for explaining the tradition's peculiarities.

Unfortunately, the topic of Byzantine legal professionalization has never been the subject of sustained research, even in secular Byzantine law – much less so in Byzantine canon law. Nevertheless, a few central facts may be asserted with some confidence.

Byzantium did know secular legal professionalization, at least of a type. Late antiquity, with its well-known law schools and "bars" may have even marked something of the high water mark of formal Roman legal professionalization, certainly on a scholastic level.[234] After the 6th C legal professionalizaiton is notoriously difficult to trace in any detail, and the documentary trail at times fades to almost nothing, but there is little question that at least in Constantinople itself throughout much of Byzantine history one can detect professional notaries, advocates, and at least private teachers of law; at the very least, the *concept* of the legal professional is present.[235]

By contrast, it is far from clear that even the concept of a professional "canonist" or "canon lawyer", parallel to the secular lawyers and jurists, ever existed in Byzantium. Without doubt it is elusive. Certainly the basic infrastructures of legal professionalization were not present: there were no "canon law" faculties in the Byzantine "universities" (such as they were) with dedicated "canon law professors"; there were no canon law qualifications; there were no clear and defined "terminal" (i.e. life-long) career paths; there were no canon law associations or guilds, with admissions policies and standards of conduct; and there seem to have been no regular and widespread dedicated "canon law" positions in the dioceses that were designed for their occupant to make a living primarily from their canon law knowledge and perhaps as the chief proprietary staff of a widespread network of purely ecclesiastical courts.[236] Even

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[233] On legal professionalization generally, and its connection to formal jurisprudential forms of thought, Weber 1925,199-222.

[234] On the shape (and ambiguities) of late Roman legal professionalization, see Brundage 2008,1-39; Garnsey and Humfress 2001,41-55; Heszer 1998,632-633; Honoré 1998,7-10, 2004,119-124 ; Humfress 2007,9-21; Jones 1964,386-394, 499-516; Marrou 1948,310-312; Matthews 2000,23-36; Schulz 1953,267-277.

[235] See now especially Goria 2005; the literature, however, remains scattered. See Haldon 1990,254-279; Macrides 1994; Magdalino 1985; Pieler, 1978,429-431, 445-448, 473; Stolte 2002,201-202; Wolska-Conus 1976, 1977; Zepos 1958.

[236] These criteria are drawn mostly from the post 12th C medieval western experience as explored by Brundage 1995a, 2008.

terms such as "canon lawyer" or "canonical jurist" (e.g. "κανονικοὶ σχολάστικοι", "σόφοι τῶν κανόνων", "νόμικοι τῶν κανόνων") are not, to my knowledge, anywhere attested in the Byzantine tradition.

One can instead detect overlapping patterns of a) canonical *specialization* associated with certain ecclesial offices, mostly attested in Constantinople itself, and of b) what we may term "borrowed professionalization". Most of the evidence is, however, quite late. The best example of the former is the patriarchal officers known as χαρτοφύλακες, essentially chief notarial and archival officers who seem to have become the *de facto* canonical experts of many administrations. Balsamon is the chief example of such officers, but others have left "question and answer" material.[237] A number of other offices – of which we often know frustratingly little – also sound as if they may have been at least in part especially oriented towards canonical knowledge.[238] But the pattern of specialization seems to be one of exceptional expertise in a particular set of text traditions – "canonical lore", as it were – and not mastery of an autonomous field of technical knowledge by which the officer was primarily making his living, and was formally qualified to pursue. These positions are better described as administrative positions demanding canonical specialization than canon-legal positions within the administration.

The pattern of "borrowed professionalization" is best exemplified by late antique ἔκδικοι (*defensores*).[239] They appear to have been charged with various aspects of their church's secular legal relations, whether in defending its own interests in the secular legal courts, in assisting in the running of the bishop's own semi-secular jurisdiction (even functioning as a judge-delegate), or in acting as an advocate for the poor and widows. We must presume that some had some canonical knowledge – the canons themselves suggest a few duties for them.[240] But they nowhere appear as "canon lawyers" *per se*, that is, as a specialized corp of proprietary lawyers of a parallel ecclesial legal system. Instead they emerge as secular *advocati* with some type of professional secular legal training who are *then* applying themselves to church affairs, including, probably, canonical matters. These offices may thus be best described as

[237] Darrouzès 1970,19-28, 334-353; *Peges* 250-258. I regret that V. Leontaritou's work Εκκλησιαστικά αξιώματα και υπηρεσίες στην πρώιμη και μέση βυζαντινή περίοδο (Athens, 1996) was unavailable for consultation.
[238] For example, the πρωτονοτάριος, Darrouzès 1970,355-359
[239] On the late antique ἔκδικοι, see now especially Humfress 1998,155-170; 2001 (*inter alia* by the same author).
[240] Chalcedon 23; cf. also canon 2.

secular-legal ecclesial positions. Much the same seems to be true of their often shadowy Byzantine successors.[241]

This pattern of borrowed professionalization is also broadly assumed by the system as a whole: the many points of integration of civil legal regulation and canonical regulation, whether in the nomocanons, the ecclesial courts, or even provincial administration, point to an ongoing need for advanced civil law knowledge within the church. Certainly formal – if not necessarily "professional" – civil legal training must always have been reasonably common in the higher echelons of the Byzantine ecclesial administration, as in the secular, where many offices mix secular and ecclesial duties.[242] In our period, we may note that some of the most prominent figures associated with Byzantine canon law were evidently secular lawyers: John Scholastikos ("the lawyer")[243] is the most famous example, but the so-called "Enantiophanes" who seems to have composed the first nomocanonical recension of the *Coll14*, was also evidently a learned jurist. Later two of the canonical commentators, Aristenos and Balsamon, will be νομοφύλακες, a civil legal position established in the 11th C, as well as, respectively, πρωτέκδικος and χαρτοφύλαξ. This pattern of the clergy using and exercising civil legal knowledge will come to its apogee in the late Byzantine period, when the clergy virtually take over the operation of the secular legal system.[244] Yet even this last does not entail the envelopment of the secular system "within" a parallel canonical system, or vice versa. The clergy are simply beginning to operate the secular legal system. (A curious result of this is that the one surviving patriarchal register, from the 14th C, has very little truly canonical content.[245])

Even this "borrowed professionalization" in the regular operation of the canonical system does not, however, seem to have involved a sophisticated and profound interpenetration of secular-legal juristic and canonical discourse. One suspects the former came into play mostly when civil legal problems emerged. It is thus revealing that the majority of canonical "questions and answers" literature, the closest

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[241] Darrouzès 1970,323-332 *et passim*. It seems that at least in Constantinople a college of ἔκδικοι continued to exist, and the πρωτέκδικοι become fairly prominent officers in the patriarchate. A similar dynamic is probably to be assumed for the later ecclesial δικαιοφύλακες, an office that could be bestowed on secular and ecclesial officials. Darrouzès 1970,109-110. See also Macrides 1990,68-69.

[242] As Wolska-Conus puts it (1979,6), "Tout fonctionnaire, dans la capitale ou dans la province, est un peu juriste."

[243] The epithet σχολαστικός does not inevitably denote legal training (Wolska-Conus 1979,5 n. 17; also Humfress 1998,75-76). However, John is referred to as ἀπὸ σκολαστικῶν, which certainly means "from the [professional] lawyers", "former lawyer". For his titles in the manuscripts, *Sin* 220-221

[244] Pieler 1978,473-476; Fögen 1987,157. Very often, however, it is unclear if certain positions are primarily treating secular or canonical matters (or perhaps both equally).

[245] *Peges* 314.

texts we possess granting window onto the "real" operation of the system, are almost always fairly simple canonical questions directed from provincial bishops to isolated clerical specialists in the capital.[246] The answers sometimes contain technical civil legal principles, and sometimes do not, but the overall pattern is of a fairly informal rule discourse informed by occasional secular legal jurisprudence – and not of an ongoing, formal and technical church-legal conversation carried on by a large network of even "borrowed" secular legal professionals dedicated to church matters. Even the canons themselves, and the thematic collections, while certainly evincing some quite technical moments redolent of professional legal composition, are in no way dominated by it.[247] Magdalino has also recently surveyed a number of well-educated 12th C bishops and discovered very little evidence of legal learning.[248]

Generally, then, Byzantine canon law does not ever emerge as a distinct sphere of professional legal endeavour. Its professional or academic infrastructure, such as it was, appears only as a kind of appendage to either the ecclesial administrative system, mostly attached to Constantinople itself, and marked here and there by men especially learned in the canons, or to the civil legal system, from which it seems to have desultorily borrowed legal expertise. But the real loci of the system's operation must have always been the much more "amateur" structures of the episcopal chanceries, and the figure of the bishops themselves, either individually or in synods, but always men of (if anything) very general education – a pattern not unfamiliar from the pre-12th C west.[249] Certainly the western explosion of canon-legal professionalization in the 12th and 13th C has no parallel in Byzantium.

D. Summary and analysis: a curious law indeed

Even from this bird's-eye view of the textual shape and development of the Byzantine canonical tradition, some of the basic cultural contours of Byzantine canon law can be discerned. The picture that emerges is both fascinating and troubling.

The primary focus of Byzantine church law seems to be the collection and transmission of a limited set of traditional rule-texts – this is the fundamental focus of what the tradition is "doing". The single-mindedness of the tradition in this regard, and the unity and stability that results, is quite striking. Although by the standards of

[246] See Konidaris 1994.
[247] See chapter 3.
[248] Magdalino 1985,171-172.
[249] See Brundage 1995,41, 120-121; 2008,46-74.

modern (printed) codifications the Byzantine manuscripts and collections can seem quite "messy" and variable, the tradition nevertheless easily reads as centered around one basic set of texts. This corpus is always gradually expanding, and its boundaries are always subject to negotiation, but it is always discernable as the basic backbone of the entire endeavour. "The canons" in the Byzantine tradition, at any given moment, always have a reasonably concrete and unitary referent, and always are the central focus of the system.

This corpus-centered culture of canon law seems to have been surprisingly universal. When one looks west and east from Byzantium, the textual worlds of Latin and Syrian canon law look very familiar in both form and content. Everywhere canon law seems to be mostly about the collection and transmission of "the corpus", and "the corpus" is similar east and west, at least in its core, and certainly its shape. At least until the 9th C, and at least in the Mediterranean region, it is probably possible to speak about a common "imperial" canonical culture.

One of the chief characteristics of this culture, certainly in the Byzantine east, is its extraordinary conservatism. This is a natural presupposition of the system's textual unity and stability. Over the *longue durée*, if a source makes it into the corpus, it is there to stay. It will never disappear, and its integrity will never be successfully challenged on a physical level – i.e. canons never permanently drop out of the tradition, no matter how obsolete they may become.[250]

The system therefore develops and is constructed almost exclusively through accretion. Its central value is preservation. Indeed, the entire tradition seems to develops almost Talmud-like, with each new layer simply placed over upon the old. Thus the patristic material and Apostolic material are wrapped around the older synodal core; the systematic indices are affixed to or gently placed over the corpus; and the second-wave material is simply added as yet one more layer. After our period this pattern will continue, with later synodal decisions and question-and-answer material simply stacked after the corpus, and, finally, the commentators' writings wrapped around the core corpus texts themselves.

This strong emphasis on the preservation of traditional texts is odd by modern standards, and suggests an almost scriptural-like handling of the texts.[251] Indeed, just as Byzantine (and indeed, all pre-modern) "theology" is mostly an ongoing cumulative

[250] The canons are eternally valid, in the formulation of Konidaris 1994,133-134.
[251] Cf. L'Huillier 1996,10 who connects the stability of the texts with their attribution to divine inspiration.

exegetical engagement with scripture, a sacred "core corpus" of traditional texts, so Byzantine canon law emerges as above all an ongoing engagement with another sacred – if growing – body of traditional texts. Just as Scripture will never be replaced or "edited" by later developments, so with the core corpus of canons. (It is also interesting to note that the fuzziness of the canonical corpus around its edges is paralleled, if to a lesser extent, by the fuzziness and variability of the Scriptural canon.[252])

This extreme emphasis on preserving legal traditions, almost as sacred texts, is undoubtedly related to one of the most striking absences in the tradition: the lack of a sustained canonical jurisprudential literature (with the requisite professional cadres). This absence makes sense. In a legal world in which preserving a semi-sacred set of traditions is paramount, the development of a discourse that might through its techniques and principles exercise some type of power *over* the laws, or perhaps replace the laws, or otherwise actively reshape the tradition (as Gratian), is quite unthinkable, and even nonsensical. The focus of the system will always be on returning to the core traditional texts, and engaging with them, not "advancing" beyond them, or constructing a more satisfying logical system *from* them. Certainly such a discourse will always be comparatively ephemeral, *around* the tradition, but not a central part of it. In any case, many traditional problems of jurisprudence are simply non-issues in the first place: sacred traditional laws cannot really contradict other sacred laws (certainly contradictions are more the reader's problem than the tradition's), and repetitions simply make traditions more traditional.[253]

The lack of even a relatively benign, non-constructive jurisprudential literature – i.e. of a more exegetical type, like much traditional Roman jurisprudence, and certainly like the later Byzantine commentators – also suggests, however, that the *function* of jurisprudence in assisting in the application and interpretation of rules is not felt to be a particularly strong need. In other words, the role of jurisprudence is already being performed by other discourses. Despite its obvious textual autonomy, then, Byzantine canon law is clearly deeply embedded in other regulative discourses from which it seems to be borrowing its secondary "rules about the rules". What is more, the tradition is obviously not particularly concerned about defining precisely what these rules are. They are evidently rather well-known, and presumably can be well known even by the fairly "amateur" personnel who seem to operate the system.

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[252] For the variations in the Byzantine canonical lists of Scripture, see the synoptic table in Boumis 1991,1.205-207.
[253] Cf. the references in the Introduction, n. 44.

The small size of the corpus is also probably linked to this expectation of embeddedness. It strongly suggests that the system is embedded in other, external regulative discourses that can fill in any legislative "gaps". Or, perhaps put better, it witnesses to a relative lack of concern about such gaps in the first place. The system can apparently survive quite well with a relatively small body of formal written rules.

Another absence that the emphasis on "law-as-preservation-of-tradition" helps to explain is the curious lack of official definitions of the law, or of any type of clear expression of sovereign positivist legislative authority over the law. It seems that legal authority must always speak from tradition and as tradition (and this is literally true: a rule is always a rule *of St. Basil* or *of Nicaea – of* some traditional authority). This makes any "present" articulation of its shape, or assertions of radical change, rather awkward. It seems that, in the present, one is mostly expected to confirm the existing tradition, i.e. to recognize authoritative decisions that have already taken place. At best, one makes a few suggestions, clarifies a bit, and occasionally makes some additions. But true assertions of "present" authority over the tradition, such as radically to modify or even categorically to define its shape, seem out of the question. It certainly never happens. The system instead encourages definition and change by the diffuse agglutinating addition of *yet more tradition*, perhaps contradicting and effectively editing or defining the older tradition, but never physically doing so.[254]

Further, even adding new material is not very straightforward. Certainly it seems quite different than what a modern positive legislator might expect. The definitive promulgation of laws seems to be a very diffuse action of the tradition itself, involving a long, quiet process of negotiation within the manuscripts in which valid law eventually "just happens". Positive legislation is thus a process of "offering" texts for the tradition's consideration. This system of rule-production is thus also very slow. Making law – or rather, waiting for the tradition to make law – takes a very long time. This precludes frequent "instrumental" use of laws to effect immediate policy goals. Such action is not impossible, but it is not easy. Looking back for earlier articulations of a desired policy is certainly the encouraged course. (This also perhaps explains the very small size of the corpus.) In any case, the immediate, unqualified, system-wide acceptance of new material – as expected by modern positivism – is not particularly evident.

[254] See Glenn 2000,65-66 on this point.

Another modern expectation – the precisionistic demand for bivalence in the assertion of validity – also seems frustrated by this form of rule-recognition. As strange as it may seem, the tradition overwhelmingly presents its sources as constituting a spectrum (!) of validity. They are presented as a large array of diverse traditions with varying levels of "marking" as to their antiquity and acceptance. At any given moment one can broadly discern what material is "in" the corpus, and what is "out", but the exact line between them is hard to determine – and in any case its significance is not immediately clear. Certainly the tradition does not encourage, and probably does not require, inquiring very closely into this question. It is consequently also very difficult to determine if any of the hierarchical rankings of the sources that are evident in the tradition (e.g. councils before fathers, ecumenical councils before local) are actually legal-doctrinal in intent; they seem almost symbolic.

In sum, then, Byzantine canon law emerges in its broadest "shape" as a rather foreign legal phenomenon. Many of the fundamental concepts, assumption and even instincts of modern formalism-positivism seem to be simply disregarded or even contradicted – or at least very oddly implemented. One thus searches in vain for a clear doctrine of positive sovereign legislative authority, or clear indications of validity, or even for a solid place for a technical professional jurisprudential discourse. Likewise, if law today is imagined as comparatively detailed and comprehensive, Byzantine law appears brief and compact; if law is supposed to be malleable, constructible, and instrumental, in Byzantium it seems rigid, conservative, traditional and even sacralized. Byzantine canon law does not have the shape we expect.

CHAPTER 2. INTRODUCING THE LAW: THE TRADITIONAL FRAMING MATERIAL

In the previous chapter we explored the fundamental physical and historical contours of the Byzantine canonical tradition for what they can reveal about the fundamental beliefs of the Byzantine canon-legal tradition. The next question is how the Byzantines themselves framed and introduced this tradition.

The Byzantine canonical tradition contains relatively few texts that directly outline the purpose, nature, and scope of church law. Those that do are therefore extremely valuable as windows onto Byzantine church-legal culture. Every aspect of how they frame and portray the canonical endeavour is important: what is said, what is not said, what is emphasized, what is assumed, what the priorities are, and what contexts and points of reference seem most prominent.

Unfortunately, little literature has been devoted to exploring how these texts shape and articulate a legal vision. Although research on Roman and Byzantine secular law prologues, as well as early western canon law prologues, has begun to consider the legal-cultural aspects of these texts,[1] the Byzantine canonical prologues have so far attracted attention only inasmuch as they can be used for reconstructing the textual history of the collections.[2] The parts of the prologues that we may term – very loosely – "legal-doctrinal" are largely overlooked in both canonical and historical literature, despite their obvious prominence in the tradition generally and, in particular, in the prologues themselves (the most doctrinal sections of the prologues tend to come first!).

This is a serious oversight. By late antiquity prologues are quite clearly and explicitly marked as an important and even essential element of legal literature – and the roots of this tradition run very deep.[3] Plato, as is well known, made it quite clear that prologues are a necessary part of the law: "the lawgiver must never omit to furnish preludes [προοίμια], as prefaces both to the laws as a whole and to each individual statute"[4]. According to Plato, these prologues provide the "simple laws" (ἄκρατοι νόμοι) of normal legislation with the philosophical and pedagogical under-girding

[1] In particular, and of most value to this study, Aerts et al. 2001, Brasington 1994, Fögen 1995, Honig 1960, Hunger 1964, Lokin 1994, Ries 1983, Scharf 1959, Simon 1994, Somerville and Brasington 1998.
[2] For example, Menebisoglou 1989; Petrovits 1970,17-53; *Sbornik* 52-86; Stolte 1998a; Zachariä von Lingenthal 1877. Exceptions include Deledemos 2002,79-82 and Viscuso 1989.
[3] For general discussions of ancient legal *prooimia*, Hunger 1964,19-35; Ries 1983.
[4] *Laws* 723b (ed. Burnet 1907).

necessary for their proper operation.[5] Plato's own *Laws* thus included a lengthy introductory section, and Cicero followed suit, championing Plato's theory.[6] Significant prologues will later also be placed in the mouths of the semi-legendary lawgivers Charandos and Zaleukos, and Philo, in his description of Moses as an ideal lawgiver, notes that Moses too understood the need to provide laws with prefaces and epilogues.[7] In Roman legal literature itself this concept does not show explicit expression until the principate, but thereafter imperial constitutions and legal collections regularly include ornate prologues and introductory-like sections.[8] Some elements of the Apostolic church order material also contain short prologues.[9]

Legal prologues are also exceptionally valuable because, in a certain sense, they are the only witnesses to Greco-Roman "legal theory" we possess from within the legal literature itself. Outside of this literature, a number of highly theoretical philosophical or rhetorical treatments of law may be found; but within the legal literature, sustained general theoretical self-reflection is quite rare.[10] The prologues – and more broadly, the introductory sections of the extant legal collections – are thus one of the very few places where ancient Greco-Roman legal literature has an opportunity to articulate its own scope, purpose, priorities, contexts and nature. They are particularly important in the Byzantine period, where explicit reflection of any type on law is very hard to find.[11]

For our purposes the Byzantine tradition of canonical introduction may be understood as constituted by virtually any text, or set of texts, that seems to frame the canonical material. The most obvious and important of these are those texts that directly and consciously introduce the tradition, i.e. the formal prologues or epilogues

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[5] *Laws* 721b-d, and more broadly 718a-724b. See Fögen 1995,1597-1599; Laks 2000,285-290; Ries 1983,104-126, 212-223; Scharf 1959,68 n.2.

[6] Cicero *Laws* 2.6.14 (ed. Powell 2006); Ries *ibid*. Plato's prologue in the *Laws* may be considered to extend from 715e until 734e (of course, the *Republic* itself may be considered an enormous prologue).

[7] The *prooimia* of (pseudo-)Zaleukos and (pseudo-)Charondas are preserved in Stobaeus (ed. Wachsmuth and Hense 1884). For Philo, see *Life of Moses* 2.51 (ed. Cohn 1902,119-268); see also 2.46-48 on the purpose of Moses' historical introduction.

[8] See Ries 1983,162-185; three prologues from Diocletian seem to be our first substantial surviving examples (Fögen 1995,1594). A list of the secular *prooimia* taken into account for this study may be found in Appendix B (1).

[9] Notably, and taken into account into this study, the short prefaces (and sometimes epilogues) of the *Apostolic Tradition* (and related sources), the *Constitutiones ecclesiasticae apostolorum*, the *Didascalia apostolorum* and the *Apostolic Canons*. For editions, see Appendix D (4).

[10] That is, the jurists themselves do not seem to have produced any works of "Roman legal philosophy". The general lack of Roman legal theory is a commonplace observation; see for example Johnston 2000; Schulz 1953,69-70, 135; Stein 1995,1539.

[11] On this last, Aerts et al. (here B. Stolte) 2001,145: ...with the exception of the *prooimia*, there is no Byzantine reflection on law as a social and political phenomenon.... It is very hard to ascertain what the Byzantines thought about their legal system.". See Fögen 1993,72 on a similar state of affairs for Byzantine political theory.

attached to various collections. Also important are introductory letters prefacing individual sources, and canons or topics in the sources and systematic indices that may be construed as broadly introductory in content or form. Many extant manuscripts also contain identifiable introductory "sets" of articles that include not only the formal prologues, systematic indices and tables of contents, but also a varied selection of other introductory-type texts such as excerpts from the Apostolic church order material, synodal histories, lists of thrones, and sometimes doctrinal material. A full schematic of the Byzantine canonical introductory tradition may be found in Appendix B (2).

The focus of the present study is the most substantial monuments of "introduction" of our period: the Nicene and Apostolic prefaces, the prologue to the *Coll50*, the first two prologues to the *Coll14*, the Trullan introductory complex, and II Nicaea 1. These texts are distinguished by their prominence in the tradition (regularity and place in corpus structures and manuscripts), their depth of content, and/or their length. Although quite varied, this material together provides a rich and reasonably coherent image of the nature and function of canonical regulations. We will also briefly consider some of the more minor introductory texts found within the corpus itself.

A. Content

1. The Nicene Creed

The first significant "prologue" to the canons was almost certainly the Nicene creed itself. Presumably it was added at the same time as the Nicene canons.[12] It is to be found heading the canons in Schwartz' chief witnesses to his Antiochian corpus, most notably London BL Add. 14 528 (a. 500/1) and the Isidoriana translation of the Freising-Würzburger manuscripts; other witnesses are not difficult to find.[13] In London BL 14 528, the creed is found amidst a number of other texts that head the collection:[14]

1. A note ascribed to Constantine
2. The edict of Constantine against the Arians
3. The Nicene Creed
4. The Constantinoplitan Creed
5. Subscription list of Nicaea

[12] Schwartz 1936a,161-162, 193-194, 200-201, 225; so *Delineatio* 26, and also Ohme 1998, who even suspects (527-542, 579) that a homoion creed may have prefaced the early Antiochian corpus, later replaced by the Nicene.
[13] See Turner 1936,1.1.2.106-111, 154-155, 174-175. Cf. the close association of the two in Carthage's Apiarian Dossier (*Fonti* 1.2.426-247). Also Selb 1989,98 n. 71.
[14] In Schulthess 1908,1-4, helpfully described by Schwartz 1936a,161-162.

The presence of the Constantinopolitan creed in particularly notable. In effect, a "credal section" seems to have been developing at the head of the corpus. This is quite logical: one places the ὅροι of faith together with the ὅροι of discipline (to use the older terminology for church rules)[15] – and the former function as a kind of ideological and theological framework for the entire work.

This practice of creedal prefacing does not become normative in the later Greek tradition. Occasionally in later manuscripts creeds will be included among a number of introductory articles, but this does not seem to have been a widespread practice.[16] It does, however, find resonance in a much more general tendency of beginning collections, manuscripts and sources with some type of faith or theological topic. This tendency is quite consistent throughout the tradition. Thus, for example, Title 1 of the *Coll14* starts with "theology" and "the faith" (imitating *CJ* 1.1), as does Constantinople 1, Carthage 1-2, Trullo 1, the Epitome of Arsenius (12th C; title 1), and Blastares (14th C; Πρόλογος περὶ τῆς ὀρθοδόξου πίστεως).[17] Some manuscripts may also be found with series of doctrinal ὅροι (if not creeds) stacked at their opening.[18] In general, and in a tradition reaching back to classical antiquity, one thus tends to start the law with God and with the divine.[19]

2. The Apostolic Material

The Apostolic material plays an introductory and framing role in a number of subtle, but critical ways. The only element of this material to achieve an assured place in the

[15] See Schwartz 1936a,193.

[16] For example, Moscow Syn. 432 (in Latin!); however, the creed can also appear with the Nicene canons in the corpus, as in Athos Meg. Lav. B.93, or Oxford Rawl. G. 15.

[17] This last very explicitly keeps treats faith outside of, and ahead, of the collection's alphabetical scheme because of its preeminence. *RP* 6.46-49.

[18] Cambridge Ee.4.29 (11th C) is an excellent example, containing, among other confessions, the ὅροι of Chalcedon, Constantinople II, Constantinople III and Nicaea II; see also Vat gr 2184 (with a few doctrinal letters of Cyril) or Paris supp gr. 1089 (with an article on the *filioque*, and a confession of faith). These type of doctrinal articles may also be very frequently found in manuscript appendices; see Burgmann et al. 1995,264. Here also might be counted various liturgical introductory articles (short commentaries or other instructions; e.g. in Escorial Gr. X.III.2, Milan E.94.supp, Paris gr. 1263; Vatican gr. 640, Vienna Hist gr. 7). It is further interesting that in the Greek *acta* of Chalcedon the canons, probably drafted in committee, are often placed as "session 7" after the creedal statements in "session 6": the faith/creeds and the canons always seem to be a pair. See Price and Gaddis 2005,1.xiv, 1.81 n. 277, 3.92-94.

[19] This pattern is very common in ancient near eastern and Greek legal literature, and may be seen in everything from the tendency of starting legislation with an invocation to the gods (the simplest version of which is the θεοί heading ancient Greek constitutions), to treating the divine legitimacy and origin of the legislator and his laws (e.g. Hammurabi 28-41, ed. Richardson 2004), to, as here, beginning with matters pertaining to the divine – "faith". This last Plato (*Laws* 715e-718a; 723e, 732e) understands as a natural imperative, and is very clearly expressed in Cicero *Laws* 2 and Zaleukos and Charandos' *prooimia*; the Ten Commandments start this way as do, broadly, Deuteronomy (1-11), and thus Philo *Special Laws* 1 (ed. Cohn 1906,1-265) (and also Josephus *Antiquities* 3, ed. Niese 1885-1892), *CJ* 1, and the *Basilica*. See Hunger 1964,29-31; Ries 1993,11, 14, 20, 82, 88, 90, 98-99, 117-118, 120-121, 212-22.

Greek corpus are the 85 canons from the eighth book of the Apostolic Constitutions. Placed prominently at the beginning of the collection since at least since the 6th C they themselves constitute a kind of "Apostolic preface": the later conciliar material now reads as following from this original Apostolic disciplinary "conversation". Canon-like material is flowing out of the very mouths of the apostles.[20] The "Nicene canons" have become the "Apostolic-Nicene canons".

More concretely, the Apostolic canons also contain a short but dramatic epilogue in which the Apostles themselves turn to speak directly to the bishops:

> Thus have these things regarding the canons been prescribed for you, O bishops. If you remain steadfast in them you will be saved [or "preserved safe": σωθήσεσθε] and you will have peace; but if you are disobedient you will be punished and you will have eternal war with each other, earning the just recompense for your disobedience. God, the only unbegotten and maker of everything through Christ, will unify you through peace in the Holy Spirit, and will prepare you for every good deed [Heb. 13.21] without deviation, blame or reproach, and will make you worthy of eternal life with us through the mediation of his beloved son Jesus Christ, our God and savior, through whom is glory to the God of all...until ages of ages, Amen.[21]

This short text is sometimes lost in modern editions and translations,[22] and it seems to be absent in some of the commentators' recensions,[23] but in the older manuscripts it is usually appended to the last canon, sometimes as part of it, or often as slightly separated; it is in any case clearly an integral part of the text. It is perhaps most prominent in the *Coll50* where as part of Apostolic 85 it is attached to the final title, very consciously placed as the conclusion to the entire work.[24]

Its content is remarkable. It begins with a small but critical identification: the primary audience of the canons is the bishops. This identification is largely consistent throughout the tradition. The canons are above all rules for bishops (and secondarily,

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[20] cf. Schwartz 1936a,199-200. Many small literary techniques in the canons dramatically enhance the sense of these canons issuing from the very (collective) mouths of the apostles. Thus, for example, in Apostolic 15, 26 "**we** ordain"; in 27 "**our** Lord"; in 29 "as Simon Magus was [cut off] by **me**, Peter"; in 82 "as **our** Onesimus appeared ", 85 (a listing of Scripture) "**our** own books... and the Acts of **us** the Apostles". See generally Metzger 1985,1.33-38; Steimer 1992,130-133 et *passim*.

[21] Greek text in Appendix B (3).

[22] For example in *RP* 2.111 it is relegated to a footnote; Joannou's handling of it is excellent, placing a line-break between it an Apostolic 85 (*Fonti* 1.2.52-53). The *Pedalion* (1800) incorporates it into its introduction (p. xix-xx)

[23] So Beveridge 1672,2.40 and *Pitra* 1.36, and so not in Istanbul Topkapi 115 nor Florence Laur.5.2. Unfortunately, most manuscript descriptions are not sufficiently detailed to make a clearer determination on the scope of this omission (e.g. only when Balsamon and Zonaras together in a MS?)

[24] See *Syn* 151-155.This is particularly evident in the versions of the work in which the canons are placed in corpus-order under the titles (see chapter 4.E): the Epilogue is here noticeably out of place.

more generally, the clergy).[25] As to purpose, the canons are written for "salvation" and "peace", and disobedience will bring suitable chastisement. This chastisement is perhaps understood chiefly as ecclesial disunity, but the canons clearly open up onto eschatological horizons: obedience leads to salvation – "eternal life" – "with us", i.e. with the Apostles.[26] This last suggests that canonical obedience is part of Apostolic mimesis. The canons thus immediately emerge as very "charged" with salvific and metaphysical significance – and are clearly part of the "Apostolic" nature of the church.

Aside from the canons and their epilogue, one other set of Apostolic material also functions in the tradition in an introductory manner. It is even more invisible in modern editions and translations of the canons than the Epilogue, yet even more obviously present in the manuscripts as introductory material. This body of material is known to scholarship as the "Epitome of Book Eight of the Apostolic Constitutions".[27] Found only in canonical manuscripts, the Epitome is composed of five sections of excerpts from *Apostolic Constitutions* book eight: 1) 8.1-2 ; 2) 8.4-5, 16-28, 30-31; 3) 8.32; 4) 8.33-34, 42-45; 5) 8.46. In effect it contains most of *Apostolic Constitution* book eight save two large liturgical sections and the Apostolic canons.[28] Like the Apostolic canons, three of these fragments self-present at common teaching of the apostles: 1) "Teaching of the holy apostles regarding *charismata*"; 2) "Constitutions [διατάξεις] of the holy apostles through Hippolytus regarding ordinations"; and 5) "Teaching of all the holy apostles regarding good order". The other are presented as individual rulings: 3) "Constitutions of the holy Apostle Paul regarding ecclesiastical canons"; 4) "Constitutions of the holy apostles Peter and Paul".

The origin of these texts as a separate unit is not entirely clear, but it seems likely they hail to the 5th C, and that in the canonical manuscripts they originally formed a whole with the Apostolic canons (which would follow after the fifth section, as section 8.47, in the *Apostolic Constitutions*).[29] In the extant manuscripts, these extracts are among the most frequent introductory articles, often quite prominent as one of the

[25] See, for example, the introductory epistles of Antioch and Gangra (in *Kormchaya*) as well as II Nicaea 2; Carthage 18 refers to bishops and clergy.
[26] Cf. the strong warning of eschatological punishment for ecclesial disorder in the opening section of the *Constitutiones ecclesiasticae apostolorum* (or "Apostolic Ordinances"), ed. Arendzen 1901,60-61.
[27] Ed. Funk 1905,2.72-96, discussion at xi-xix. Of the literature, see especially Schwartz 1910,196-213; Steimer 1992,80-86. The synopsist's partial version may be found in *RP* 4.399-403.
[28] The text, however, differs from the received Apostolic Constitutions in a number of ways, which have led some scholars to doubt that it is a true "epitome". Its exact relationship to *Apostolic Constitutions* book eight remains a matter of debate. Bradshaw 2002,6; Metzger 1985,42 n. 2.; Steimer *ibid.*
[29] Schwartz 1910,196-213; cf. *Sbornik* 172-174, 180-187. Schwartz believes that they may have been separated from the Apostolic canons when the latter were integrated into the *Coll50*.

very first items in a collection, even before the systematic collections' prologues.[30] Sometimes all five sections, in various levels of abbreviation, will be present in the manuscripts, sometimes fewer, and their order can vary.[31]

Their persistence in the manuscripts is quite remarkable in light of their very mixed later reception. By the 11th C, they are sufficiently common that Michael the Sebastos chides earlier redactors for not including the rulings of "Peter and Paul", and explicitly includes them in his redaction of the *Coll14*.[32] The expanded synopsis associated with Aristenos also contains some of them.[33] Other witnesses, however, are more negative. Trullo clearly approves only 85 Apostolic canons – the only specific enumeration of canons in Trullo 2 – and condemns the rest of the Apostolic Constitutions, including, presumably, these extracts. Zonaras reiterates this disapproval.[34]

In terms of their introductory force, their primary function is to re-enforce the framing "message" of the Apostolic canons: the canonical project is first of all an Apostolic project. Second, their content is broadly introductory. Reminiscent of the introductory *Amtsweisungen* elements of ancient law codes, in which the duties of various offices are detailed near the beginning of collections,[35] its overriding, if not exclusive, concern is the description and delineation of positions, offices and authority in the church. The first section is thus concerned to regulate the status of those possessed of special χαρίσματα, including the clergy, and the relationship of the clergy and the laity – in a sense, a meditation on offices in general. Section two then details, in descending order, the forms for the ordination of the clergy: bishop, presbyter, deacon, deaconess, subdeacon, etc. Sections 3 and 4 are much broader in content, but section 5, Περὶ εὐταξίας διδασκαλία, a meditation on order in the church, returns to the general theme of hierarchical propriety. It is significant that it opens with a central theme of Greco-Roman political thinking: "This we all in common enjoin, that each remain in the order [τάξις] given to him and not to exceed its bounds...."[36] In effect, a commonplace

[30] See, for example, the recensions described in *Sbornik* 116-230 or *Sin* 70-103. Funk rightly refers to the "almost innumerable" manuscripts in which they appear. Funk 1905,xvi.
[31] Compare, for example, the selections described in *Sbornik* 131-132, 180-185.
[32] Schminck 1998,361.
[33] *RP* 4.399-403.
[34] *RP* 2.110-111.
[35] See chapter 4.F.
[36] Funk 1905,92

Platonic concept of justice, that each is to "do their [natural, class-restricted] thing",[37] has been placed in the mouths of the apostles – and this in a text that originally functioned as an introduction to the Apostolic canons, and later as a quasi-opener to entire canonical manuscripts. This theme is then developed at length, with many biblical citations enjoining each rank of Christian to adhere to their position. The overall effect of the Epitome material is therefore to act as a kind of hierarchical manifesto, setting the canons in the context of a world-view which sees order and justice – and so law – as stemming first and foremost out of proper maintenance and description of hierarchical authorities. This will resonate with the tendency of the sources and systematic collections to order their material first with *Amtsweisungen*-like material, as we will see in chapter four.

3. The Prologue of the *Coll50*: Οἱ τοῦ μεγάλου θεοῦ

The first extant formal prologue in the Byzantine canonical tradition is the πρόλογος of the *Coll50*, Οἱ τοῦ μεγάλου θεοῦ.[38] Although short, it is a refined and erudite work, a compact rhetorical *tour de force*, written in a Greek sufficiently sophisticated as to border on obscurity.[39] It even seems to evince a very regular prose rhythm.[40] It may be divided into three sections: a general introduction with doctrinal and historical content (4.1-20)[41], a technical discussion of the method of composition of the *Coll50* (4.20-5.16), and a short introduction and listing of the canonical sources of the collection (5.17-7.2). These section divisions correspond to sentence divisions in the texts: the first section encompasses the first two sentences, 4.1-14 and 4.14-20; the second section the third sentence from 4.20-5.16 (although this perhaps should be divided at 5.8 οὐκ αὐτοὶ); and the third the remaining text from 5.17 until the end.

The first part of the prologue, comprised by two lengthy periods, is an exceptionally rich and densely woven amalgam of images and ideas. It sounds a number of critical framework themes and narratives of the later tradition.

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[37] That is, τὸ τὰ αὐτοῦ πράττειν. See especially *Republic* 433a-434c (and broadly from 369a onwards); cf. *Laws* 756e-757d. The basic idea is that justice is realized when each part of the city/soul is functioning in its proper (hierarchical) place and order.

[38] Edition in *Sin* 214-218 and *Syn* 4-7, the latter slightly more complete, and our source here. On this prologue generally, see *Sin* 213-220; Menebisoglou 1989. A provisional English translation may be found in Appendix B (4). Russian translation: Zaozerski 1882; Latin: *Pitra* 2.375-378; partial German: Zachariä von Lingenthal 1877,617.

[39] On this point, see *Sin* 213. Beneshevich believes that this very complexity of diction and syntax may help account for the text's very stable transmission.

[40] *Sin* 213, n.1; some of Beneshevich's emendations are based on apparent violations of this rhythm.

[41] Page and line numbers are from Beneshevich's second edition.

The elaborate first clause (1-3), setting up the period that resolves in line 6, introduces the agents of legislation: οἱ τοῦ μεγάλου θεοῦ...μαθηταὶ καὶ ἀπόστολοι καὶ μὴν καὶ...οἱ μετ᾽ ἐκείνους καὶ κατ᾽ ἐκείνους ἀρχιερεῖς καὶ διδάσκαλοι.... Both the "disciples and apostles" of Jesus Christ and the "archpriests [i.e. bishops] and teachers" of his church who "followed and were like" the disciples and apostles (οἱ μετ᾽ ἐκείνους καὶ κατ᾽ ἐκείνους – a striking phrase[42]) are brought together as the common agents of the canonical task. Canonical legislation thus flows directly out of the evangelical and apostolic tradition, in a sweeping trajectory that has Christ himself at its source – albeit indirect source. In effect, the canons are an apostolic project, with episcopal continuators. A similar sentiment will be expressed in the *Coll87* introduction, Εἰς δόξαν θεοῦ (a work also ascribed to John Scholastikos) where the canons are described as ...κανόνας τῶν ἁγίων καὶ μακαρίων ἀποστόλων καὶ τῶν τοῖς ἴχνεσιν αὐτῶν καθ᾽ ἑκάστην σύνοδον ἀκολουθησάντων ὁσίων πατέρων...[43] The canons are written by the fathers who, in so doing, are "following in the steps" of the apostles.

The basic context of their actions is immediately made clear (4.3-5): the apostles and bishops have been entrusted "by grace" with shepherding the "multitude" of both the Jews and Gentiles who have "abandoned" the "diabolical deception and tyranny" and have "deserted to the King and Lord of Glory". The canonical task is thus briefly but firmly placed within a very broad, indeed cosmic, narrative of salvation. The canons are part of the "shepherding" of the entire flock of the Christian people in their movement from the deception of the devil to the kingdom of God.

In 4.5-10 we finally meet the main verb of the first sentence as the shepherd imagery is continued, now becoming the controlling metaphor. The apostles and bishops, far from seeking to harm wrongdoers, instead attempt to brave dangers for them: προκινδυνεύειν δὲ μᾶλλον αὐτῶν ἑτοιμότατα. Here Christo-mimetic imagery of the good shepherd laying down his life for the sheep is unmistakable, and quite remarkable in a quasi-legislative context.[44] Writing canons is part of self-sacrificial shepherding. The particular image and language here of προκινδυνεύειν, as a shepherding image, will later appear in the 9th C *Eisagoge* as part of the ἴδιον, or "particular property" of bishops.[45]

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[42] See Appendix B (4) for an alternative translation.
[43] Ed. Heimbach 1838, at 208.
[44] See John 10:15ff
[45] *Eisagoge* 8.2. A *TLG* search will reveal numerous other similar instances; see e.g. Athanasius, *Apologia de fuga sua* 24, Ignatius the Deacon *Vita Tarasii patriarchae*, 37.

The shepherding image is then significantly developed through an explicit contrast with the civil laws: the civil laws harm wrongdoers, while the canons seek to guard, guide and protect. The canonical project, as distinct from the civil laws, is essentially a pastoral task.

In the same phrase, language of pastoralism easily moves into road or way imagery: the apostles and bishops, "like the good shepherd", "hasten" to take care to guide and direct any wayward sheep that may be drifting from the straight path. The canons lead Christian on their correct "way", a salvific image.

Also smooth is the transition from legislators as good shepherds struggling (ἀγωνιζόμενοι) to keep their flock from harm to a set of medical images which constitute the first sentence's last clause (4.10-14). Still probably building a contrast with the civil laws, the apostles and bishops are cast as interested only in the healing of spiritual illness, and the restoration of the sick to health. Just as the shepherd imagery is clearly biblical in its immediate inspiration, the medical imagery is also explicitly Christianized by an allusion to Ephesians 6:17, "the knife of the Spirit, which is the word of God" (4.11), which is wielded by these canonical-healers. Notably, at the same time, the Spirit also enters as a necessary co-worker with the fathers in the restoration of the sick: "Thus by the grace and co-working of the Spirit they restored to their first health those who were ill."

The next sentence (and the beginning of the third) turns to more mundane, but no less important, details of the "story" of the canonical legislators. We learn that the apostles and fathers have taken forethought for those μετ᾽ ἐκείνους καὶ κατ᾽ ἐκείνους, and how they might – to resume the pastoral purpose of the canons – keep those who are ruled "unharmed" (4.14-15). Their method of choice is made immediately clear: to convene in synods, which the divine grace arranges (τῆς θείας χάριτος οἰκονομούσης). "Grace" thus enters again as an active agent in canonical legislation. Fathers, the prologue continues, have thus in various times met in synods and there set forth certain "laws and canons, not civil but divine" (4.15-18). The basic mode of legislation is thus clearly established as the council. The terminology used for the legislation is also significant: νόμοι and κανόνες are used virtually synonymously, and the former is clearly used to refer to ecclesiastical regulation (as also in line 4.21, and the rubric of *Coll50* 48). A distinction, however, is nevertheless – and once more – made between civil and church laws, but not as a terminological distinction between "laws" and

"canons": instead the distinction is between "civil" and "divine". The canons are thus, and in summary, divine "laws" produced by grace-inspired councils of the fathers.

The sentence ends with a series of short epexegtical phrases glossing these "divine laws" (14.18-20). The first, "regarding what ought to be done and what ought not to be done", περὶ τῶν πρακτέων ἢ μὴ πρακτέων, is a very stock phrase, a commonplace of legal definition broadly Stoic in origin and perhaps most notably, and relevantly, present in the second of the two Greek definitions of law in *Digest* 1.3.2 (that of Chyrsippus)[46]. This definition concludes: ὁ νόμος...προστακτικὸν μὲν ὧν ποιητέον, ἀπαγορευτικὸν δὲ ὧν οὐ ποιητέον. Shorter versions, as found in Scholastikos, may be found in a large variety of ancient authors.[47]

The sentence then continues by noting that the canonical work is directed towards the "life" and "manner" of each; its function is to rectify (ἐπανορθόω) both.[48] The canons thus have a very broad scope of action. Road imagery then reappears as the canons "fortify" those on the "royal road", "punishing" those who "slip" to the side. The verb "to punish", ἐπιτιμάω, may here already be a quasi-technical word for ecclesial punishments, although it and its nominal forms may be found as a reasonably normal word for "punish" or "penalize" in Greco-Roman literature.[49] Thus, although the canons of the church do not aim to "harm" (αἰκίζομαι) wrongdoers (line 4.6), they do nevertheless punish or "penalize" them.

The first clause of the third sentence, the first part of the more technical section of the prologue, turns to the circumstances that have occasioned the present systematic work (4.20-21). The "laws and canons" are presented as having "of old" emerged as an essentially *ad hoc* activity: "issued by different men for different purposes and appropriate to different circumstances" (κατὰ καιροὺς ὑπὸ διαφόρων πρὸς διαφόρους καὶ διαφόροις ἁρμόζοντες [οἱ νόμοι]). This should probably be read as a very short but striking reminiscence of the topos of *varietas naturae* remarked in some legal prologues as a way of justifying legislative changes, modifications and development.[50] Here, however, the phrase is used to justify John's *systematic* work: because of the variety of the laws, John needs to put everything in a more user-friendly form (4.22-5.2). This characterization of the canonical process is also significant in itself. The canons are not

[46] Frag. mor. 314, ed. von Arnim 1903,3.77.
[47] See the list of such "Gebot-Verbot" phrases in Triantaphyllopoulos 1985,82.
[48] For similar usage of this language in another regulative-legal context, see Demosthenes' definition of law cited below.
[49] Liddell-Scott 666-667, Lampe 537-538.
[50] E.g. in *Cordi* 4, *Tanta* 18, *N.* 7.2; see Fögen 1987,142; Honoré 1978,27 n. 298, 299; Hunger 1964,171-172; Simon 1994,19. On the philosophical underpinnings of the topos, see esp. Lanata 1984,165-187.

presented here as the product of an intentional legislative program, but instead as arising to meet the demands of various times, and as they emerge (ὡς ἀπήτει τὰ κατὰ χρόνον ἀναφυόμενα; cf also a similar notion already in lines 4.15-16, ἕκαστοι κατὰ καιροὺς ἰδίους εἰς ταὐτὸ συνιόντες...).

In the same sentence John quickly reviews the central sources of legislation, the Apostles, the Ten Synods, and Basil (4.22-23), before continuing with a more detailed description of his actions in creating his thematic collection, which runs through 5.16. This section will be discussed in more detail in chapter 4, but it may be remarked here that the overall tone of the section is curiously defensive. John must not only repeat how chaotic the material is in origin (4.20-21, 24, earlier at 18, again in 5.3-4), and emphasize how difficult it is to find anything (...ὡς ἐκ τούτου **δυσεύρετον** εἶναι **κομιδῇ** καὶ **δυσπόριστον** τὸ πρός τινων ἀθρόως περὶ κανόνος ἐπιζυτούμενον), but also emphatically note that he is not the first to do such a thing (οὐκ **αὐτοὶ** τοῦτο **μόνοι** καὶ **πρῶτοι** ποιῆσαι τῶν ἄλλων ὁρμήσαντες...no innovation here!), but that the previous attempt is defective, and needs replacing (5.11-12). Everything, he notes, is of course done "by the grace of our lord and God and Saviour Jesus Christ" (5.2-3).

Most of these elements may be read as versions of justificatory and humility topoi, common for an ancient introduction, but one may also suspect a real unease in handling what was by this time already a very well established and prominent corpus of texts; it seems that one modifies this type of material very gingerly. Scholastikos' handling of the material will in fact be marked by extreme conservatism and scrupulous concern for completeness (see chapter 4): Scholastikos is truly only simply making things easier to find, as he is taking pains to stress.

The prologue concludes with a listing of its sources, and especially an "Order of Synods". As already noted, a rudimentary but clear hierarchy of sources is evident: the Apostles first, then the "order of synods", and then the legislation of Basil. The three form distinct groups. The councils are in the Nicene order: Nicaea first, then everything else in chronological succession. The apostles are not counted as a first synod. Interestingly, within the synod listings, the canons are consistently described using the formula: Τῶν ἐν [council] πατέρων... κανόνες [a number]". As such, agency of the "fathers" themselves is slightly emphasized, and the difference with patristic regulations slightly elided. This is coherent with the usage of the rest of the prologue, where the agents of legislation are always either the "apostles" or the "fathers": the councils themselves are not agents. This literary "tic" may also be seen in a set of iambic verses

found concluding the *Coll50* in one manuscript (Εἴληφαν ὧδε κανόνων τίτλοι τέλος / Ἀποστολικῶν ἅμα καὶ τῶν πατέρων),[51] in the *Coll87* (cited above), and may be often remarked elsewhere in the tradition.[52] The canons are prototypically of "the apostles" and/or "the fathers".

4. The Prologues of the *Coll14*: Τὰ μὲν σώματα and Ὁ μὲν παρών

There are three prologues (the last in two recensions) associated with the *Coll14*. Two date from our period.[53] Their disposition in the MSS varies: the first may be found alone, the two may be found joined together, the two may be separate (in a variety of different places), or the second may be written as a scholion to the first.[54] In RP they are joined together: the first extends from Τὰ μὲν σώματα to μισθὸν ἀπενέγκασθαι, and the second from Ὁ μὲν παρὼν to πρᾶξιν προήνεγκεν. Following Beneshevich, it is generally accepted that the first prologue originally included the prologue proper as well as a listing of the corpus sources (Ἐκ ποίων...), although probably not the scholion to the latter (Ἰστέον ὅτι...), which treats various violations of the chronological ordering of the councils in the list, namely the precedence of Nicaea, and the subordination of Carthage, Serdica and Constantinople 394.[55] This scholion nevertheless becomes a regular part of the *Coll14* tradition.

The first prologue presents something of a textual conundrum. Not all scholars are completely convinced it is original.[56] The principal problem is that in its current form it seems to refer to the secular laws' having been placed under their appropriate titles – i.e. in nomocanonical form (line 52[57]). Since it is widely believed that the original *Coll14* was composed without any civil law placed under the titles, but only some gathered in a separate work in an appendix (i.e. as the *Tripartita*), then the first prologue as we possess it in all manuscripts must be interpolated. Further, it is curious that the dating of the council of Carthage (419) is wrong (line 20). The council is

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[51] *Syn* 155, n. (a)
[52] For example, Chalcedon 1, Trullo 2, *N.* 137.1.
[53] Sound critical editions do not exist for either. *Pitra* 2.445-451 remains the best, and our source. *Kormchaya* (1-4) also contains an edition of the first. There seem, however, to be no major variants (Stolte 1998a,187). A provisional English translation may be found in Appendix B (5). Russian translation: Narbekov 1899,2.7-19; Latin: *Pitra ibid.*; partial German: Zachariä von Lingenthal 1877,619, 626-627.
[54] *Sbornik* 52-60, with examples. On the *Coll14* prologues generally, see Deledemos 2002, Stolte 1998a, Menebisoglou 1989.
[55] *Sbornik* 69-84.
[56] Most recently, Stolte 1998a.
[57] Line numbers refer to the version of Pitra, counting down continuously, not including titles, headers or footers.

presented as held under Honorius and Arcadius: this is in fact the correct dating for Constantinople 394, a council that was very probably added to the corpus with the *Coll14*, but that strangely is not mentioned in the prologue – is it possible some type of elision or copyist error has occurred?[58]

The reference to the κεφάλαια in line 52 does not, however, absolutely have to refer to the *Coll14* titles. It is quite possible that it refers to the titles found in the *Tripartita* itself.[59] Further, although it is widely thought, following Beneshevic, that the original *Coll14* was not nomocanonical in form, there is still no absolute proof of this; it is still only a widely-accepted assumption.[60] Finally, the dating error is not immense: the first πράξις is dated to Honorius and *Theodosius* – only one name is wrong. Further, two of Carthage's πράξεις are dated to Honorius and Arcadius (those before canon 34 and 86). There is thus plenty of room for a simple slip. We needn't imagine a major elision. It is also possible that Constantinople 394 was considered a "patristic" canon, and thus its lack of specific mention. The extant prologue, then, may preserve perfectly well the original.

In any case, the prologue clearly is pre-Trullan, and even if interpolated very likely dates at least to the early 7th C (i.e. the time of the nomocanonical recension). Its author, as that of the *Coll14* itself, remains unknown.

The second prologue is, happily, explicitly dated (29-31) to 6391, i.e. 883. This is one of the very few firm dates that can be attached to any early or middle Byzantine canonical collection. In some manuscripts, this prologue is attributed to Photius; scholars are mixed in their reception of attribution.[61] It is possible.

The first prologue, Τὰ μὲν σώματα, has the same basic structure as οἱ τοῦ μεγάλου Θεοῦ. It begins with a doctrinal section (lines 1-17), moves to a technical discussion of the details of the collection's composition (18-57), and then concludes with a list of sources included in the form Ἐκ ποίων. The second prologue consciously reads as an extension of the second part of the first prologue, although it does briefly reprise some "doctrinal" themes in its first sentence (1-7) before turning to the practical details of its own additions (8-50).

The doctrinal section of Τὰ μὲν σώματα, like οἱ τοῦ μεγάλου θεοῦ, is written in a sophisticated Greek, albeit with fewer and less ornate periods. It is composed of two

[58] So Honigmann 1961,68-72; Menebisoglou 1989,232-234; Stolte 1998a.
[59] The more common reading; see Deledemos 2002,92-93; Menebisoglou 1989,236-238, also Petrovits 1970,18-20 for further references.
[60] cf. Stolte 1998a,186, 193.
[61] See the references in chapter 1, n. 106.

brief meditations, both of which are presented as the motivations for the collector's work.

The first (1-11) is an extraordinary little account of the anagogical ascent of the soul. Its essence is simply that in order for the soul to rise up towards "higher visions", (θεωρίαι), to enter the "heavenly vaults" and enjoy not just "shadows" but "true good things" (οἱ ὄντως ἀγαθοί), and to have divine visions, it must be nourished with good thoughts and good deeds – thus the importance of the canons. No direct source in antique philosophical literature for the narrative as a whole, or even specific sentences, has yet been identified, but in general content it is an entirely conventional late imperial anagogical account of the soul's heavenly ascent, synthetic in orientation, but broadly (neo)Platonic in diction, imagery and ideas.[62] In standard Platonic fashion, the movement of the soul is contrasted and compared to bodily movements, with the soul being portrayed as ultimately moving upwards towards higher "visions", unrestrained by measure and time, and encountering in the "heavenly vaults" not the shadows of reality, but the realities themselves.

The second "meditation" (11-15) then moves more directly to the nature of law, and is almost unique in the Byzantine tradition in providing something very close to a definition of canon law: the "divine decrees" (θεσμοί) are "a discovery and gift of God, the dogma of prudent and God-bearing men, the correction of willing and involuntary sins, and a secure rule for a pious way of living that leads to eternal life" There is nothing ambiguous about the ultimate source of this quotation: its pagan provenance is made quite explicit ("transferring to the divine statutes what was once said by one of the ancient σόφοι"). It is in fact a modified version of Demosthenes' famous definition of law in *Against Aristogeiton 1* 16.[63]

Like Chrysippus's definition of law, vaguely echoed in the Οἱ τοῦ μεγάλου, Demosthenes' definition may be found in Marcianus' *Institutes*, preserved alongside Chrysippus in *Digest* 1.3.2. We should not assume too quickly, however, that the *Digest* was the direct source for the *Coll14* author.[64] A potential allusion to Chrysippus' definition in the last line of the sentence (ἀσφαλῆ κανόνα, not in Demosthenes, but recalling the κανόνα δικαίων καὶ ἀδίκων of Chrysippus) does perhaps point this way: both are held together in *Digest* 1.3.2, and both here. However, like Chrysippus'

[62] See e.g. Plato *Phaedrus* 79b-e, 245-7; *Republic* 514-517 (and book seven broadly), *Timaeus* 90a-c. References from Deledemos 2002,79-80.
[63] Ed. Butcher 1907,770-800. See Appendix B (6) for the full passage in Greek.
[64] As Deledemos 2002,81.

definition, Demosthenes' should almost certainly be regarded as a legal commonplace. It may be found, for example, twice in the Hermogenian corpus of rhetorical works, the single most popular rhetorical corpus in the late imperial period – including once in the progymnastic exercise "Introduction of a Law" in Aphthonius, the most popular progymnastic handbook.[65] It will certainly eventually become a regular member of small groups of legal definitions in later Byzantine legal treatises.[66] Finally, it should also be recalled that Demosthenes himself was among the most important, popular and probably well-read rhetor in the late imperial and Byzantine periods, and it is not impossible that the author took the extract directly from the original.[67]

In content, the *Coll14* version of this definition may be usefully compared to the original and to the form found in the *Digest* (italics indicates modifications; boldface, additions):

Demosthenes *Against Aristogiton 1* 16	*Digest* 1.3.2 (compared to original)	*Coll14* (compared to original)
...πείθεσθαι προσήκει διὰ πολλά, καὶ μάλισθ' ὅτι πᾶς ἐστι νόμος εὕρημα μὲν καὶ δῶρον *θεῶν*, δόγμα δ'ἀνθρώπων φρονίμων, ἐπανόρθωμα δὲ τῶν ἑκουσίων καὶ ἀκουσίων ἁμαρτημάτων, πόλεως δὲ συνθήκη κοινή, καθ' ἣν πᾶσι προσήκει ζῆν τοῖς ἐν τῇ πόλει	...προσήκει πείθεσθαι διὰ πολλὰ, καὶ μάλιστα ὅτι πᾶς ἐστιν νόμος εὕρημα μὲν καὶ δῶρον *θεοῦ*, δόγμα δὲ ἀνθρώπων φρονίμων, ἐπανόρθωμα δὲ τῶν ἑκουσίων καὶ ἀκουσίων ἁμαρτημάτων, πόλεως δὲ συνθήκη κοινή, καθ' ἣν ἅπασι προσήκει ζῆν τοῖς ἐν τῇ πόλει.	*πεπεισμένος* **τούτους** εὕρημα μὲν καὶ δῶρον **εἶναι** *θεοῦ*, δόγμα δὲ φρονίμων **τε καὶ θεοφόρων** ἀνθρώπων, ἐπανόρθωμα δὲ τῶν ἑκουσίων καὶ *παρὰ βούλησιν* ἁμαρτημάτων, καὶ *πολιτείας* **εὐσεβοῦς τε καὶ πρὸς ἀτελεύτητον** *ζωὴν* **ἀγούσης ἀσφαλῆ κανόνα**

Aside from a few minor stylistic features, the only substantial modification of the *Digest* text from the original is the placing of "gods" in the singular. The *Coll14* text has also retained much of the substance of the original. The canons are ultimately divine in

[65] Hermogenes *On Ideas* 1.6 (ed. Rabe 1913,213-413); Aphthonios *Progymnasmata* 14 (ed. Rabe 1926,1-51). In both places it is found in a truncated form, but it seems reasonably clear, especially in the first instance, that the author expects familiarity with the quotation. On this corpus in the later Greek east, Jenkins 1963,43-44, Kennedy 1983,54 *et passim.*

[66] For example, from the *TLG*, *Eisagoge* (Epanagoge) 1.1; *Epanagoge Aucta.* Proem.1 ; *Basilica* 2.1.13-14*; Ecloga Basilicorum* 2.1 13-14; *Prochiron Auctum* 40.53; Michael Attaliates *Ponema* Proem.2; see also Triantaphyllopoulos 1985,10 for further references.

[67] See his preeminence in Hermogenes' *On Style*, for example. See broadly Gibson 2002; Marrou 1948,161-165; Kennedy 1983, 1994.

origin, and they are the production of "wise men".[68] The canons also correct the "wrongdoings" or "sins" of men. (The retention of the "persuasion" terminology is also interesting; in the *Coll14* paragraph this reads very oddly until one realizes that it is part of the quotations – which undoubtedly indicates that the *Coll14* author expected his authors to know the original citation).

A few important modifications have nevertheless been made. First, the author adds "god-bearing" men. While laws are the decrees/judgment of wise men in general, the canons are those of god-bearing men, i.e. of the Christian fathers who are saints, holy men. The canons again emerge from holy men.

The next change of ἀκουσίων to παρὰ βούλησιν is curious, but likely simply stylistic.

The changes in the last phrase are the most significant. The basic roots – and root ideas – of πολι- and ζω/η- are retained, but are clearly moralized and eschatologized, and purged of any notion of, as it were, "social contract".[69] Thus the secular idea of the laws as emerging from a "common covenant" for the good of those living in the city is clearly removed: the church is not a divine city with a kind of divine "common covenant". Instead, the Chrysippian idea of law as a "rule" is invoked (κανόνα τε εἶναι δικαίων καὶ ἀδίκων)[70], but here, unlike in Chrysippus, it is a rule of a "pious" – i.e. properly religious – way of life that has an eternal end. Πολιτεία here undoubtedly retains some sense of "citizenship", but its very common, more generic meaning as "way of life" is more obivous: canon law provides a rule for moral, pious living.

Across both "meditations" the canons thus emerge as divine, oriented towards the whole moral "life" of their subjects, emerging from sacred origins and clearly part of a dramatic eschatological ascent of the soul towards "higher visions".

After the Demosthenic definition the author rapidly moves to more practical issues, with the two meditations presented as precisely the impetus and rationale for his "eager" endeavours at compilation: "considering these things...and persuaded that...I have with zeal attempted to gather..." (11-17). His description of his compilation activities (15-18), although brief, is very similar to the corresponding section of Scholastikos, and thus suggests that he writing to a kind of formula: he a) immediately

[68] We should probably not hear a reference to Aristotelian "practical wisdom" (*Nic. Eth.* 6.5, 7) here. See Auberque 2008. Cf. however O'Meara 2003,136-138.
[69] Perhaps to the disappointment of those seeking traces of a Byzantine "perfect society" ecclesiology.
[70] *Digest* 1.3.2

turns to the question of sources which are b) introduced as arising in "different" times (with the same διάφορος vocabulary), and c) his focus is the "Ten Synods". He cannot resist, however, along the way, another quick epexegetical gloss of the purpose of the canons of these synods: they "confirm" the divine dogma of the church and are useful "teaching" for all men. This could be read as a paring of faith and moral discipline as twin subjects of the canons; in any case it again confirms the canons' broad intellectual and moral scope.

Unlike Scholastikos, he then engages in a long source-critical aside on three sources: the Apostles, Carthage, and the patristic material (18-41). Each seems to have excited some controversy, and the author feels obliged to justify their inclusion. Only the Ten Synods seem to be admitted without question.

The Apostolic canons are treated first, but quite summarily. He simply notes that he will include them, "even if" some have thought them to be ἀμφιβόλοι. Hesitation about their authenticity is, however, perhaps conceded: τοὺς **λεγομένους** [κανόνας] τῶν ἁγίων Ἀποστόλων may have the sense of "so-called". But concerns about them are simply dismissed.

Carthage is treated at much greater length. The "synod in Carthage", the reader learns, is to be accepted, but only with a lengthy proviso on the local nature of some of its regulations, especially those regarding married clergy, which receive a rather elaborate critique (25-29). The general reason for their acceptance is explained, however, with an interesting aside: the author has found in them much ordained "which is profitable for life", πολλά τε καὶ πόλλην ὠφέλειαν εἰσάγειν τῷ βίῳ δυνάμενα (21). Again, the canons function in the realm of "life".

Next, the propriety of accepting writings of individual fathers as canons is addressed (29-41). Their acceptance is clearly problematic, and the author admits knowing that both Basil and Gregory forbid canonical regulations from individuals: they must be issued by "many holy fathers coming together in the same place", testing and debating matters at length. Here then, as in the οἱ τοῦ μεγάλου θεοῦ, canons are clearly first and foremost conciliar canons; others must be justified. However, he feels that patristic material contains much "piously said" that may still be regarded "in a certain way" as providing a κανόνος τύπον, "type of rule". He then offers a few reasons. First, he notes, the patristic writings often simply clarify the synodical material, and when they add something new they do not contain anything contradictory in either letter or meaning (56-62). (One may remark here the passing reference to the

common rhetorical and legal hermeneutical categories of "letter" and "meaning" κατὰ λέξιν ἢ νοῦν.) Furthermore – and this seems to be the clinching argument, built up in a series of dramatic clauses – patristic judgments are not to be rejected because of the spiritual stature of the fathers, whose words "flash forth" with the light of the Holy Spirit: ἔκ τε τῆς τῶν προσώπων ἀξιοπιστίας, ἔκ τε τοῦ πνευματικοῦ φωτὸς τοῦ κατ᾽ ἐνέργειαν Θεοῦ τοῖς εἰρημένοις ἐπαστράπτοντος...(39-41). Again, holiness of divine men, and the action of the holy Spirit, emerge as key factors in canonical legislation.[71]

Having defended and outlined his sources, he then discusses his systematic work of dividing the material into fourteen chapters (41-57). Like Scholastikos, he must again articulate his work in part with critical appraisal of "certain" forbearers, τινες τῶν πρώην (49-50). He disapproves in particular of the tendency in older works to write out canons in full under the titles, instead of simply giving references to the appended corpus. This results in the repetition of canons, and even their fragmentation under different titles, which he finds completely unjustified. This criticism is usually thought to refer to Scholastikos, who did indeed write out the canons in full under his titles instead of providing a straight corpus collection. However, it must be remarked that this is not a *particularly* good description of Scholastikos. Scholastikos in fact very rarely repeats or divides a canon; he is much more remarkable for *not* repeating or dividing.[72] We may wonder if these criticisms should be taken as more symbolic than concrete, a necessary element in a justification for anything new.[73] In any case, they do function to express a rather extraordinary conservatism vis-à-vis the integrity of the corpus: it is better to leave the straight corpus as it is, with only references in the titles.

After a brief description of his secular-legal additions, the author concludes with a brief invocation for the success of his venture, with the help of God and the prayers of the saints (55-57). His assertion that his work is meant to provide "something useful" "mostly for himself", but also "for others", should be taken as a humility topos, and not a doctrinal statement of the "private" nature of his collection.

The much later second prologue, ὁ μὲν παρὼν πρόλογος, has as its main task the description of the 883 recension's additions. It begins with a survey of the content of

[71] There is also a certain irony – that encapsulates very much about the Byzantine canonical world – present in this work's concern about the legitimacy of the patristic legislation. The author's worry is explicitly based in the prohibitions of Basil and Gregory – and yet these very prohibitions are in the canons in question! (Basil 47, Gregory 6) In a sense, the author assumes the authority of the canons whose authority he is debating. Real authority in this world is always in *traditional* rules, whatever their formal qualities.

[72] See Appendix B (7) for details.

[73] See *Sin* 324-325, who also seems slightly tentative about this attribution.

the first prologue. Echoing the first few lines of Scholastikos, the author portrays the canonical endeavour as constituting a continuous trajectory of development from the time of the Apostles onwards (1-3). (The Apostolic canons are also obviously accepted without comment, as we would expect by this time.) The original author is thus commended first for his work in gathering the synodal canons from Apostolic times up until the "fifth" council – the priority of conciliar canons as "proper" canons is assumed – but his decision, and its criteria, to include some individual, καθ' ἕνα, authors is also approved (2-7).

Turning to its own content, a quasi-*varietas naturae* topos again briefly and obliquely emerges, with the typical διάφορος vocabulary, to describe how since that time many events "of life" have transpired, and synods have been convened for "various" reasons (8-9). Unlike the earlier prologues, however, this author now states that he will not criticize his forbearers – he will instead happily follow in their footsteps, attaching the new material to the old. A very traditional, conservative note is thus struck: this author does not wish "to inflict indignities upon the works of the ancients". He will simply add to their work.

He then lists his main additions, Trullo, II Nicaea, Protodeutera and Hagia Sophia. The ordinal numbering is used for the ecumenical councils, and Trullo, as is common at this time, is termed "the sixth" council. The description of the contents of II Nicaea, briefly detailed, contains one striking phrase: its canons are presented as rectifying τὴν ἱερὰν πολιτείαν. It is tempting to hear in this phrase the conceptualization of the church as a "sacred polity", a state-like constitutional body, or at least a body approaching some idea of a "perfect society". However, "sacred way of life", meaning the "Christian way of life" or "life of the church", is probably a more accurate reading, and it may even refer to the life of the empire as a whole. It may also refer to monasticism as II Nicaea does contain an important series of monastic canons, from 17 to 22.[74] If it does bear any of the stronger, more constitutional connotations of "sacred polity", it is one of the very few references of its kind in the canonical literature.[75]

The prologue concludes with a short mention of the addition of certain secular legal precepts, and a careful dating.

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[74] Cf. a similar usage in (from the *TLG*) Diadochus *Capita centum de perfectione spirituali*.51; John Climacus, *Scala paradisi* 26

[75] Possibly also in Blastares *RP* 6.1; cf. Viscuso 1989,206-207.

5. The Trullan Complex

It is fitting that the first canonical legislation after a hiatus of almost 250 years should be prefaced by an elaborate introductory complex. In this respect, as in others, Trullo may be read as recapitulative and retrospective in tone, symbolically "taking stock" of the tradition as a whole, but also creatively re-expressing and re-formulating it.

This complex is three-fold, containing a prologue-like προσφωνητκὸς λόγος and two introductory canons surveying Orthodox doctrine (Trullo 1) and the canonical corpus (Trullo 2).[76] This structure, as a unified structure, is most apparent in the many manuscripts where canons two and three are separated by the topical rubric περὶ ἱερέων καὶ κληρικῶν, referring to canons 3-39.[77] This gap breaks the introductory complex off from the main body of canons, and reveals the true structure of Trullo as a whole: a century of "proper" canons (3-102) prefaced by the λόγος and two introductory canons.[78]

The first element in the manuscripts, the προσφωνητκὸς λόγος (Τῆς ἀῤῥήτου καὶ θείας χάριτος...) is, in genre, a standard address to the emperor requesting his ratification of the council's work. It is modeled on the much shorter προσφωνητκόν found in the manuscripts before Constantinople I, which it cites verbatim in its final formal request (54.18-55.7)[79]. Although ultimately focused on the emperor and the matter of ratification, and thus not a prologue in quite the same sense as the previous texts, it nevertheless offers a dense and extended representation and contextualization of the council's canonical work.

Like the earlier prologues, it is characterized by a sophisticated literary style, with numerous complex periods. Its general composition, however, differs from these earlier works (and particularly the first *Coll14* prologue) in one fundamental way: unlike the earlier prologues, it employs Scripture intensely, through both numerous direct quotations and allusions.[80] It may be considered, in fact, as chiefly an exercise in the Scriptural glossing of the canonical process and the key canonical "players": the bishops and the emperor. This difference finds an analogue in the much greater use of Scripture and Scriptural imagery in later Byzantine secular legal prefaces as compared

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[76] The best text is now Nedungatt and Featherstone 1995, a slightly corrected version of Joannou's.
[77] On these rubrics, see chapter 4.F.
[78] On the genre of the century, originally apparently monastic in origin, see Louth 2007.
[79] Page and line references to Nedungatt and Featherstone 1995.
[80] It contains at least fifteen direct quotations, noted in Nedungatt and Featherstone 1995. The first "doctrinal" section of the *Coll14*, in contrast, aside from the reference to Demosthenes as one of those "from outside", contains virtually nothing overtly Christian.

to Justinian's prologues.[81] It is part of a much broader "Scripturalization" – and especially "Old Testamentization" – of discourse sometimes remarked of the late 6th and early 7th C, both east and west.[82]

The logos may be divided into four sections. In the first (45.17-49-12), the canons are set into a detailed narrative of salvation history, similar to that glimpsed in *Coll50* (3-5), but now finding much fuller expression. The treatise thus begins with a brief summary of Christ's salvific work and its consequences: the truth has come to all, the first serpent, "the great mind, the Assyrian", has been captured, and proper worship established (45.17-47.10) – "in short, all has become new". (2 Cor 5:17). "But" (47.11) the devil, enraged by our salvation, has not ceased from trying to attack us. His attacks are effected, in particular, by means of our passions, τὰ παθή (47.21) – and thus have a strongly moral dimension. But God has not overlooked our helplessness, but has raised up in "each generation" (48.6-7) those who "in the stadium of life" fight against the devil. Here shepherd and road imagery, and the "spiritual knife" of οἱ τοῦ μεγάλου θεοῦ are reprised as these "leaders of the flock" (48.15), drawing upon the "knife of the spirit, which is the word of God", wrestle with the evil one, shattering his "tyranny", and "setting us straight upon the road of the Lord", lest we slip (ὀλισθάνω language again) down the "cliff of ἀνομία" because of "ignorance of the better".

This last idea, of moral corruption being connected to ignorance, a standard Platonic notion, introduces the concept of canons-as-teaching, which the next sentence develops in a rather philosophical vein: while we have been granted being (εἶναι) by God, it is also necessary that he show us the path to well-being (εὖ εἶναι), and this he has done through the "luminaries and teachers of the church, who illuminate for us (φωταγωγούντων) the ways of God and urge us towards the Gospel – and whose "life is in heavens" [Phil 3:20], according to the divine Apostle." Canonical work is thus the (philosophical) work of divine teachers, aimed at leading us to "well-being", and all more or less understood in highly moral terms.

"Whence", the second section (49.13-51.12) begins, Christ, the "helmsman of that great ship of the present cosmos",[83] has appointed the emperor as a pilot

[81] It begins intensely with the *Ecloga*, and is very prominent in the introductions to the *Prochiron* and *Eisagoge*. Cf. Scharff 1959,70-72. For the more generic appeals to the divine in the Justinianc prologues, see the references in n. 113.

[82] In the west, see Kottje 1970; for the east, Pieler 1997 and also, with further references, the comments of Brandes 2002,19 on the "Davidic ideology" of the Heraclean period.

[83] ὁ...πηδαλιουχῶν....Χριστὸς... This is surely the source of both the title "Pedalion" and frontispiece image of the famous work of Nikodemus the Hagiorite (Kallivourtsis 1800), despite some speculation of a Russian origin from кормчая (on which, Chernesheva 1998, Žužek 1964,10-13).

(κυβερνήτης) over us – we, who have been living "rather lazily", and whose virtue, ἀρετή, has been slowly stolen by the enemy (49.13-19). The emperor's office is then extensively glossed by a series of Scriptural and standard Greco-Roman gubernatorial metaphors and epithets: the emperor is pious, "working judgment and justice in the midst of the earth", "walking in a blameless way" [Ps. 118:1 – the "law" Psalm, note], born from wisdom, full of the divine spirit, the eye of the *oikoumene*, meditating on the law night and day [Ps 1:2], and so on. Finally the central point is made: given all of these qualities, he is not only to look not to his own life, but to the spiritual safety of all of his subjects (51.4-12).

In the third section (51.13-54.7) the transition is made to recent history, and the more concrete details of the request. The last two ecumenical councils had not issued canons, with the result that corruption and decay had set in (51.13-52.20). Here another quasi-definition of the canons and their effect is offered:

> ...[the fifth and sixth councils did not write canons] through which the people might desist from their worse and lowly conduct and might be brought to a better and loftier life; and thence it follows that the holy nation, the royal priesthood [1 Pet 2.9] on whose behalf Christ died, is torn asunder and led astray through by the many passions resulting from lack of order [ἀταξία] and is detached little by little and cut off from the divine fold, having slipped away from the achievements of virtue through ignorance and neglect; in the words of the Apostle: "They have spurned the Son of God, profaned the blood of the covenant by which they were sanctified, and outraged the Spirit of grace" [Heb. 10:29]. (52.3-20; trans. Nedungatt, modified)[84]

Again, a rich tapestry of behaviour, morality, life, virtue and good-order associations is the focus and "realm" of canonical legislation. Interestingly, the absence of canonical regulation is quite serious: it results in behaviour that treats the blood of the covenant as "common", and – finally the main verb is reached in the original! – is an insult to the grace of the Spirit.

The emperor, however, the treatise continues (52.20-53.16), in imitation of the good Shepherd, has desired to gather the "special people" (περιούσιον λαὸν; Deut. 14.2/Tit 2:14) again and persuade them to keep the "commandments and divine ordinances" (τὰς ἐντολάς τε καὶ τὰ θεῖα προστάγματα, common Old Testament regulative terms) – thus he has called the ecumenical council. The canons are thus significantly assimilated to Old Testament regulations, and the emperor appears almost Moses-like. At the same time, these commandments also move in a New Testament

[84] Greek in Appendix B (8)

valence: they remove us from dead works, and make us alive (52.4-6, cf. Heb. 9:14) After a few more biblical glosses of conciliar process, the formal request for the emperor to ratify their canons is made (54.8-55.7).

Trullo 1, the first introductory canon, is a lengthy survey of doctrinal heresy, and its history of condemnation. It is most interesting for its very self-conscious articulation of the precedence of doctrinal matters as a subject for canonical regulations. It begins: "The best order when beginning any treatise or matter is to begin with God and to end with God, according to the words of the Theologian". This line is an explicit and literal borrowing from Gregory Nazianzen.[85] Trullo must begin with properly "theological" matters, i.e. doctrinal matters relating to God. The rest of the canon is a lengthy profession of faithfulness to tradition, running through the condemnations of every ecumenical council to date.

The second canon is of most interest for our purposes. Indeed, as the only "official" articulation of the Byzantine corpus, this canon is one of the most commented upon in modern Orthodox canonical literature.

The canon begins as a continuation of the first: ἔδοξε δὲ καὶ τοῦτο... The two are, in a sense, written as a pair. Unlike the first canon, however, its primary intention is not provide a general survey, but, as already noted, is rather more specific: to condemn the Apostolic Constitutions and to confirm and clarify the acceptance the Apostolic canons, one element of the corpus. The criterion for their acceptance is notably entirely traditional: they have been "received" and "ratified" (ἐπικυρόω) by the "holy and blessed fathers". Once more the canons are the product of the "divine fathers". The canon goes on to explain that while the eighty-five (a rare enumeration) Apostolic canons are to be accepted, the Apostolic constitutions are not to be received, because of various doctrinal corruptions.

Within this initial ruling is a very short, easily missed articulation of the purpose of the canons: [the canons are]"for the healing of souls and curing of passions" (64.20-65.1). Once again the discourse of healing emerges, and particularly on the moral level of the "passions" and "soul". The medical imagery will be briefly reprised at the very end of the canon: one who tampers with a canon will be subject to the penalty that canon pronounces, "thus being healed [θεραπευόμενος] by that in which he stumbles" (69.8-9).

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[85] Gregory Nazianzen *Apologetical Oration* 2.1 (*PG* 35:408-513). The sentiment is something of a commonplace. Cf. the opening lines of Charondas *Prooimion* or the (Pseudo) Pythagorean Golden Verses (ed. Thom 1995; see commentary 102-106).

Once this particular matter is addressed the canon moves on to "seal" the rest of the corpus: ἐπισφραγίζομεν δὲ καὶ τοὺς λοιποὺς πάντας ἱεροὺς κανόνας.... A list of sources then follows which, as has long been noted, is nothing other than – more or less – the table of contents of the *Coll14*. The councils are again listed in the form that stresses patristic agency, as in the *Coll50*: the canons of the (x) fathers, gathered in place (y). In no case is the number of canons enumerated: these are it seems, too well known. They are, in any event, enumerated in the traditional *Coll14*'Εκ ποίων... table of contents which the canon likely presumes.

6. II Nicaea 1

The final major introductory structure within the corpus is one of its most important and interesting. Like Trullo 2 and Chalcedon 1, II Nicaea 1 is broadly a "confirmation" canon, affirming the corpus. Its emphasis, however, is much more obviously on confirming loyalty *to* the tradition than confirming the tradition per se. Its chief focus is exhorting the clergy to canonical obedience, an idea that is continued in II Nicaea 2, which prescribes (among other types of knowledge) canonical learning for the episcopate.

Like Trullo's προσφωνητικὸς λόγος – but even more so – the canon is dominated by Scriptural references. Indeed, the content of the canon is mostly conveyed through an extraordinary series of Scriptural "glosses" by which the canons are dramatically assimilated to the Scriptural texts.

The canon begins with the assertion that "the patterns of the canonical constitutions are the testimonies and instructions for those who have received the priestly dignity" (τοῖς τῆν ἱερατικὴν λαχοῦσιν ἀξίαν μαρτύριά τε καὶ κατορθώματα αἱ τῶν κανονικῶν διατάξεών εἰσιν ὑποτυπώσεις). The term μαρτύρια, "testimonies", is a common biblical term for "laws": the canons are thus biblical laws for the clergy. The biblical origin of the former term is made immediately explicit by a series of glosses from Psalm 118 each of which mentions "testimonies" (vss. 14, 138 and 144 combined, and, allusively, 141):

> ...which [the "patterns of the canonical constitutions"] gladly receiving we sing to the master with the God-revealing David 'I delight in the way of your **testimonies** as upon great wealth' and 'you have commanded justice, your **testimonies** unto the ages; give me understanding and I will live forever' and 'unto the ages' the prophetic voice has commanded us 'to keep the **testimonies** of God and to live by them'

The clergy are thus exhorted to embrace "gladly" the canonical constitutions just as David embraced the μαρτυρία of the law – a message significantly conveyed with Psalm 118, the classical Davidic meditation on the law. Further, characteristics of the Old Testament are now transferred to canon law: they are eternal and they pertain to justice and "life" – indeed, to eternal life ("I will live forever"). The effect is thus a quite blatant and striking assimilation of canon law to the Old Testament law.

This assimilation is heightened in the next line, where the clergy are exhorted to maintain the canons unchangeably[86] "because the God-seeing Moses thus says 'it is not possible to add anything to them nor to take anything away from them'". This citation is from an even more legally-charged source, Deuteronomy, and is nothing other than Moses' injunction to not add or take away from the law (Deut. 4:2; 12:32; the first, especially, is in a preface-like position; cf. also Rev. 22:18-19). In Trullo 1 it had been earlier applied only to doctrine, but here it is applied to the canons.

The climax of the section comes with the next Scriptural glosses, now from the New Testament. Here 1 Peter 1:12 and Gal 1:9 – "'into which things angels long to look' and 'if an angel should preach to you another gospel contrary to that which you received, let him be anathema'" – are cited. In their own contexts, these passages refer to the Gospel message itself. Here they are made to refer to the canonical regulations. The anathema reserved for those who preach a different gospel is now referred to those who violate the canons. The canons have been assimilated even to the Gospel.

In the second section, marked by τούτων οὖν οὕτως ὄντων, the canon turns to its listing of the canonical sources, which its authors "embrace to our bosom with gladness". Yet again, however, this passage begins with a reference to Psalm 118:162, again applied to the canons, now to gloss the "embracing" of the canonical tradition by the council: "rejoicing in them as one who finds great spoil". Then follows a listing of the elements of the corpus, but only in broad groups: Apostles, six ecumenical synods, local synods, and fathers. (This is the first witness for the "Tarasian" order dividing general and local councils.) The church, the canon makes very clear, adheres to these in their completeness ("we hold fast to their commandment, complete and unshakable"), "for,"– in another dramatic statement of the canonical sources' divine and spiritual origins – "they [the sources] have all shone forth from one and the same spirit".

[86] ἀκράδαντα καὶ ἀσάλευτα, unshaken and unmoved. A very rare pair that, curiously, also occurs in Philo, *Life of Moses*, 2.14, precisely in the context of describing Moses as the ideal lawgiver and his laws as eternal and unchangeable.

Inspired by the "same" spirit, all of the traditional sources are authoritative, and all must be adhered to in their integrity.

The canon concludes with a clever literary appropriation of a conciliar topos of loyalty to tradition. Throughout the conciliar tradition, it is common to proclaim that "as the fathers have condemned [such and such]... so we also condemn..."[87] This is an important way in which the councils articulate their fidelity and continuity with traditional teaching: the members of the councils are carefully locating their pronouncements within the trajectory of traditional articulations of the faith. Here, however, the canon creates a canonical version, by mimicking this formulation with four most common canonical punishments: anathema, deposition, excommunication, and "penance" (ἐπιτίμια). Thus, the canon continues, "those whom they placed under anathema, so we anathematize, and those under deposition, so we depose, and those under excommunication, so we excommunicate, and those given over to penance, we subject to the same penance". The council of II Nicaea, clearly, is entirely loyal to the canonical tradition.

The canon then immediately concludes with a citation of Hebrews 13:5: "for 'let your manner be free from love of money, content with what you have' [ἀφιλάργυρος γὰρ ὁ τρόπος αὐρκούμενοι τοῖς παροῦσιν] clearly proclaims the divine apostle Paul who ascended to the third heaven and heard unutterable words". This point of this passage is a little obscure, and even the 12th C Byzantine commentators seem unsure what to make of it. Zonaras' suggestion, that it is meant ("I think") to imply that the canons are not to be added to, on the model of someone who is always grasping to add more money to his store, is quite likely.[88] This reading is coherent with the earlier citations from Deuteronomy, and the immediately proceeding professions of mimetic penal loyalty. It is obviously not, however, intended as a categorical, doctrinal prohibition of *future* legislation: this canon is, it must be remembered, followed by 21 new canons. Instead, it is a simple admonition to continued loyalty to the traditional corpus – no *other* corpus is to be admitted, or any other irregular additions. In this, it sums up the canon nicely: in accordance with Scripture, one is to be entirely "content" and loyal to that which has been handed down. The canons must be maintained and adhered to in a fashion

[87] For example, in Trullo 1; the *TLG* reveals numerous instances, for example in *ACO* 1.1.7.66 or *ACO* 4.1.2.9.
[88] *RP* 2.559; Balsamon simply copies Zonaras. Aristenos seems to paraphrase it in the same way, although his meaning is not entirely clear. *RP* 2.560.

appropriate to their identity, which – the message of the canon as a whole – is nothing other than quasi-Scriptural.

7. Minor texts

A few more minor introductory structures may be noted within the corpus itself. Some are little more than phrases in introductory sections of canons; others are more substantial. A number witness to important elements of the broader Byzantine conceptualization of canon law.

Within the conciliar literature, four sources possess formal introductory structures. The most elaborate is the oldest, a synodal letter from the bishops at Gangra to their brethren in Armenia. It includes both a section before the canons, and a closing epilogue. The former details the circumstances of the synod, listing the problems that provoked its disciplinary decisions (in a slightly different order than the canons that address these problems). The list concludes with a significant summary of the Eustathian's misbehaviour: "For each of them, since they went out from the ecclesiastical canon [ἐπειδὴ τοῦ κανόνος τοῦ ἐκκλησιαστικοῦ ἐξῆλθεν], kept their own individual laws [νόμους ἰδιάζοντας ἔσχεν], for there was no common opinion among them, but whatever each one conceived, this he added, to the slander [διαβολή] of the church and to his own harm". The flow of associations is notable: to fall away from the general "ecclesiastical canon", here in the sense of "general rule of church order", is to set up "laws" for oneself (although νόμοι here perhaps tends towards its sense as "customary practices") and to fall into individualistic ideas, which in turn leads to shame for the church and harm to oneself. Proper church order thus implies a unified and common set of regulations, and violations of this end in both shame/accusing/ dishonouring of the church and personal harm.

Following the canons, the lengthy epilogue (ταῦτα δὲ γράφομεν) clarifies the council's position: the bishops are not condemning asceticism per se, simply its excesses. One sentence is particularly notable for our purposes: the council is condemning those who "are introducing novelties against both the scriptures and the ecclesiastical canons". The pairing of "scriptures" and "ecclesiastical canons" is significant: the two apparently constitute basic reference points for the question at hand, separate but clearly complementary. (The use of the singular, generic "ecclesiastical canon" in the preface, and the plural "ecclesiastical canons" here, is also notable; the two usages are obviously interchangeable, or at least not mutually exclusive, even if

neither is necessarily referring to concrete written regulations.[89] The "canon" implies "canons". We will return to this in chapter three.). Finally, all errors are innovations: καινισμοί. Right regulations are traditional. The whole phrase is echoed again in the epilogue's concluding sentence: "and so, in summary, we pray that everything that has been handed down from the divine Scriptures and the apostolic traditions be observed in the holy church." Proper discipline – as expressed by the council in its canons – is above all part of faithful adherence to Scriptural and Apostolic traditions.

The next introductory structure of the corpus, the letter prefacing Antioch, is most immediately notable for its very strong rhetoric of harmony and unity, ὁμονοία and συμφωνία, both common concepts in late Greco-Roman discourse of governance and order.[90] The canons also clearly effect, and presume, harmony. Also prominent is a sense of the Spirit/God's agency: the "grace and truth" of Jesus is thus the immediate subject of the "correction" of matters in Antioch, binding the church together in unity with harmony and concord "and a spirit of peace"; indeed, "in everything" correction has been accomplished "by the assistance of the holy and peace-giving Spirit". The council has thus gathered "believing in the grace of Christ and the Holy Spirit of peace, that you yourselves [the letter's recipients] will also be of the same spirit [συμπνεύσητε] united to us in and present together with the Holy Spirit and thinking the same thing with us... sealing and confirming that which has seemed correct to us by the concord of the Holy Spirit". Canonical legislation is overwhelmingly a task of the Holy Spirit, both in its formation and its acceptance.

The short προσφωνηκτικόν of Constantinople, directed towards asking the emperor's ratification of the bishops' canons, is perhaps most notable for a short gloss to explain the purpose of the canons: ὑπὲρ τῆς εὐταξίας τῶν ἐκκλησιῶν. The canons are for the "good order" of the church. The concept of εὐταξία is a completely commonplace notion of Greco-Roman political discourse. Also of interest is the basic subdivision of the council's work: first, the bishops explain, after "renewing harmony with each other", they "ratified the faith" of Nicaea, and "anathematized heresies that have appeared against it", and then, "in addition to these things...we defined the said canons". Here again "faith" and "canons" appear held together as a pair as the two fundamental tasks of a council – the former, of course, clearly precedent.

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[89] cf. Ohme 1998,401.

[90] The latter most famously in *N.* 6pr; also, for example, *N.*132pr. On the former, especially, see Schofield and Rowe 2000 *passim.*

Carthage, a compilation of compilations, is quite sophisticated in its historical composition.[91] Happily, it presents itself in the corpus rather simply, as a dossier of material from the council of 419 treating the Apiarian affair at which are "read" two series of canons, the first from the Apiarian council itself (1-33), and the second (34-133) a compilation of earlier African councils, often separated by short introductory *acta* extracts.[92] The Apiarian *acta* themselves enclose these two "readings", before and after.

As a composed/compiled whole, the most important "introductory" material is the first two canons, extensions of the first set of Apiarian *acta.* Their content is simple and unsurprising: the first confirms the Nicene creed and the Nicene canons, just read in the proceeding acts; the second likewise confirms that the faith/creed "handed down" is to be confessed, and "then", second, that "ecclesiastical order" is to be maintained. They thus both cover, in a sense, the same ground as Trullo 1 and 2 – confirmation of the faith and then canons – but in a very abbreviated form. Again "faith" and "canons" are held together as a natural pair.

Finally, a last conciliar introductory structure, Chalcedon 1, as already noted, is a short general confirmation canon: Τοὺς παρὰ τῶν ἁγίων πατέρων καθ' ἑκάστην σύνοδον ἄχρι τοῦ νῦν ἐκτεθέντας κανόνας κρατεῖν ἐδικαιώσαμεν. Its probable referent has already been discussed. The usage of referring to the canons as "of the holy fathers" *in* synods is present here as well: the canons are always first and foremost productions of "the fathers".

Within the patristic canons, four sources contain reasonably prominent introductory structures: Cyril, Basil, Gregory of Nyssa, and Dionysius.

Cyril's letter to Domnus contain a brief and elegant introductory sentence that comments upon the function of canonical order: "Each of our affairs, when properly transacted according to canonical order, breeds for us no trouble and delivers us from the ill-words [δυσφημία] of any, but rather procures for us praise [εὐφημίας] from right-thinking men". Here again the language of εὐταξία emerges, but also now closely connected with shame/honour-type language: good canonical order brings εὐφημία, bad, δυσφημία.

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[91] See especially Cross 1961; the synoptic table in *Fonti* 1.2.194-196 is extremely helpful.
[92] The first series is prefaced at *Fonti 1.2*.214.1-6 by ἔπειτα τὰ ἐν ταῖς συνόδοις τῆς Ἀφρικῆς νομοθετηθέντα τοῖς παροῦσι πεπραγμένοις ἐντιθέμενα γινώσκονται. The second at 1.2.249.3-5 by ἀνεγνώσθησαν ἔτι μὴν ἐν ταύτῃ τῇ συνόδῳ διάφοροι σύνοδοι πασής τῆς τῶν Ἄφρων χώρας.

The Basilian corpus contains three "framing" structures: a preface each to letters 188 and 199, and an epilogue, canon 84, the last canon in letter 217.

In both epistolary prefaces the most striking and central emphasis is teaching. In the simple and short preface to letter 199 Basil commends Amphilochios' desire to learn – especially as Amphilochios (as a bishop) has been entrusted with teaching (2.117.5-16). The preface to 188 is more involved. Teaching is immediately the focus as well, and now in the leading sentence, set in the (biblical) context of acquiring wisdom: "Wisdom will be reckoned to the foolish person who asks questions" (Prov 17.28). Amphilochios is asking a question in order to gain wisdom: canonical knowledge is a matter of wisdom, which must be taught. Basil then notes he too becomes wiser in his efforts to answer, "learning many things I do not know", πολλὰ ὧν οὐκ ἐπιστάμεθα διδασκόμενοι. Here Deferrari has deftly detected an important allusion to a saying of Solon: γηράσκω δ' ἀεὶ πολλὰ διδασκόμενος.[93] Consciously, or even unconsciously, Basil is presenting himself and his work as an imitation of *the* great Athenian lawgiver – and, more so, in precisely the aspect as a learning/ed lawgiver-sage. The basic theme of lawgiving as wisdom learning/teaching is thus subtly, but very effectively, reinforced

The phrases πολλὰ ὧν οὐκ ἐπιστάμεθα διδασκόμενοι is not simply a rhetorical flourish. It also introduces Basil's very real disposition in issuing his answers, revealed in the next few lines. Basil is going to learn from Amphilochios' questions because he himself will try to "remember" if ever he heard something of the "elders", and, if not, to reason out to similar conclusions from what he has been taught. Basil's wisdom-lawgiving activity is thus primarily about making recourse to the tradition, remembering it, and then reasoning from that tradition when it is silent on particular questions. In fact, Basil's canons do in fact read as conveying traditional regulations and commentating on those regulations.[94] Law is very much about remembering tradition, and talking about tradition.

Gregory of Nyssa's canonical letter comprises one of the most sophisticated and carefully structured elements of the Byzantine canonical tradition. It begins with a significant introduction, the setting of which is dramatic: Pascha. Gregory begins by noting that it is one aspect of Pascha that the church can "perceive the lawful and canonical *oikonomia* [ἔννομός τε καὶ κανονική οἰκονομία] of those who have

[93] "I grow old ever learning many things". Deferrari 1926,7 n.1. The reference may be found in collections of apophthegmata attributed to Solon as one of the "seven sages" (ed. Mullach 1860,219-235); it may also be found (from the *TLG*) cited in Plato *Laches* 189a, Plutarch *Life of Solon* 31, and elsewhere.
[94] Basil 1, 8, 9, 13, 18, 21, 30, 34 etc.

committed transgressions, so that every spiritual weakness that has occurred by some sin may be healed". (*Fonti* 2.203.16-20). He explains further that Pascha, as the feast of the resurrection [ἀνάστασις] of the fallen, is thus also the moment of the rectification [ἀνόρθωσις] of those who have sinned, when not only the new catechumens are baptized, but penitents reconciled to the church: "those who through repentance and turning from dead works return to the living road" and "are lead to the saving hope". (204.10-19) In light of this, he continues, it is his task, to present a coherent and systematic account of the weaknesses that lead to penance, and how they may be healed.

The canonical task is thus intimately presented as naturally intertwined with two major discourses. The first is the central salvific discourse of Christianity itself: death and resurrection, and particularly as mediated and experienced in the church's central liturgical Paschal experience. The basic penal dynamic of the canons, excommunication, is thus significantly glossed as nothing other than a movement from death to life (...ἐπιστροφῆς ἀπὸ τῶν νεκρῶν ἔργων εἰς τὴν ζῶσαν ὁδὸν...) (204.15-16). Here the familiar themes and images of "life" and "road" re-appear. They are set for the first time, however, explicitly within the context of the new Paschal life of the resurrection. The penitential discipline of the church participates in the Paschal rhythm of the church's life.

The second discourse is that of medicine and of the healing of the soul. Developed at great length into the organizing scheme of the entire letter (discussed in chapter four) it casts the canons as addressing the three fundamental types of spiritual diseases: intellectual, the desirous, and the appetitive. The debt to ancient psychology is obvious.

One of the oldest introductory element in the corpus is the epilogue to Dionysius of Alexandria's canonical letters (*Fonti* 2.14.3-18). Here again teaching is prominent, although denied as part of a humility topos: Dionysius has responded to the questions Basilides, setting forth his mind "not as a teacher but with much simplicity, as befitting for us to converse with each other". Of course, Dionysius *has* been teaching Basilides.

This humility topos is nevertheless interesting, and highlights another theme – or almost tonality – that runs through some of the introductory material. While Dionysius is here teaching Basilides, the tone of the epistle as a whole does nevertheless suggest a level of real bilateral conversation, or at least, of a fairly humble sharing of opinions.[95]

[95] Especially "ταῦτα μενοῦν ὡς φρονῶ καὶ συμβουλεύω περὶ τούτων ἔγραψα" at *Fonti* 2.11.17-19; also perhaps at 12.4.

Dionysius is probably truly offering his opinion to his brother bishop, Basilides, who is then exhorted to judge for himself, and write back should he consider another answer better (14.11-15).

This "dialogical" sentiment – a sense that law is emerging out of a fairly polite discussion – should probably be understood in the context of broader antique traditions of *philia*, by which normativity and regulation tends to be stylized as a fairly polite affair, focused on consensus, friendship and persuasion, not coercion.[96] It is most obvious and blatant in Dionysius, but it is also present elsewhere. In the letters in Antioch and Gangra, for example, the bishops are "asking" their brother bishops to adopt their canons. Another example is the almost "chatty" form of the parliamentary process embedded in Serdica and parts of Carthage – Hess's *dixit-placet* form.[97] The bishops are (notionally) "talking around" the issues, and the canons read as such. Even Basil and Gregory of Nyssa, although their writings are more obviously cast as answers from superiors to inferiors, retain a sense of it: legislation emerges out of a discussion between student and teacher, or father and son. Gregory of Nyssa's epilogue, in particular, makes clear that his work is composed in a spirit of fraternal concern (*Fonti* 2.226.12-17: διὰ τὸ δεῖν τοῖς τῶν ἀδελφῶν ἐπιτάγμασι πείθεσθαι κατὰ σπουδὴν).

This dialogical stylization of legislation is much less evident elsewhere in the tradition, but it is not entirely absent. A highly sublimated form of it may be recognized in the subscription lists.[98] In these lists, every bishop individually attaches his name to the council's *acta*, sometimes adding his own statement of assent. The canons are thus framed as emerging very much as a communal effort, and having garnered widespread support (whatever the reality). The effect of these lists is quite powerful, fully appreciated only when one flips through page after page of them in the manuscripts, marveling at both the amount of time such lists must have taken to create, and copy. It may also be noted that these lists serve to realize the "patristic" mode of referring to conciliar canons: the canons do seem to emerge *from the fathers* of the council.

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[96] See Brown 1992,35-70, and the references above on Plato's concept of the *prooimion* (n 5). On consensus in the early church, Hess 2002,29-33. In light of these close connections between law, moral suasion, and consensus, Hess' tendency to oppose the first to the latter two (79-81, 89), part of his narrative of the "legalization" of canon law, is not convincing.

[97] Hess 2002,24-29; he closely connects it with the concept of consensus at 72-74.

[98] In the extant manuscripts, however, the only substantial list to be found is that attached (sometimes) to Trullo. See Ohme 1990. Carthage also sometimes contains a short list (*Fonti* 1.2.407-410). Earlier, they were more common, as Balsamon notes (*RP* 2.300-301), and as translations in older Syrian and Latin manuscripts indicate. For these last, see the *Clavis* entries in chapter 1, n. 33.

Even more abstractly, a kind of dialogue is also present in the pervasive discourse of tradition: a dialogue with the dead. This is a discourse that will be explored in greater depth next chapter, but already we can see that even Trullo and II Nicaea, self-consciously authoritative ecumenical councils, must speak out of and with reference to the "fathers" of the past, and indeed, must emphatically profess their loyalty to the past in their introductory canons. Deference to tradition is, as we have seen, a theme of many of the texts examined above. It is also possible to read this deference as a form of persuasion: the constant professions of faithfulness to the past evince a need to persuade, and appeals to tradition function to reassure and convince the reader of the legitimacy of the legislation. This persuasive effect is best appreciated in comparison to modern modalities of legislation, where there is little evidence that law-writers feel they must persuade their readers of their legitimacy in any way. Their authority and legitimacy is grounded not in an ongoing conversation with the past but the formally and absolutely defined powers of their office/institution.

B. Central Themes, Priorities, Problems

1. An Initial Problem: "rhetoric"

Taken as a whole, the Byzantine introductory material sets the canons into a complex and rich matrix of images, concepts and associations. At times bewildering, these images and concepts nevertheless coalesce around a number of central themes and ideas that are deeply revealing of the legal imagination whence they emerge.

The most immediately striking aspect of these texts, however, is not a specific theme or idea, but instead their general style and tone. Whereas crisp and precise conceptual prose might be expected of a modern code or legal introduction – certainly modern Orthodox canonical manuals read this way – the Byzantine introductions are extraordinarily ornate, allusive and imagistic, sometimes to the point of obscurity. This is particularly true of the doctrinal sections of the formal prologues, where the nature of church law is most directly addressed.

This "rhetorical" orientation of the introductions is hardly surprising within the broader context of late antique and Byzantine literature. But whereas in theological, epistolary, historical or philosophical texts we might expect and understand such a mode of writing, in legal literature it is somehow more disconcerting. Yet even in legal literature the rhetoricization of law is one of the stock "vulgar" characteristics of late

antique and later legislation – and no where is it more pronounced than in the legal prooimia.[99]

This oddly rhetorical style makes it exceedingly difficult for modern scholarship to read these introductions as seriously expository of legal realities. Indeed, in the literature, such introductions tend to be consigned to merely subsidiary propagandistic or symbolic functions, important in themselves, but somehow extrinsic to real legal concerns. These texts are thus easily explored as "mirrors" of imperial ideology, or of changes in political structures (mainly as part of the legitimization and enforcement of new structures), or of Byzantine culture generally – but, strangely enough, not as mirrors *of the law itself*.[100] In other words, rarely does anyone asks what it might mean for the nature of a legal system, on a theoretical level, to be so highly invested in such a literary form of self-fashioning.[101] Instead, the "law itself" is always assumed to be a constant modern-like technical-formalist reality underlying this rhetorical "decoration", and perhaps manipulated by it. This outer layer of literary fluff is, at best, to be mined for bits and pieces of "real" legal doctrine that might be buried within – as if the introductions *really* mean to be speaking like the introductions to modern statutes, but just happen to be constrained by the (decadent) rhetorical mores of Byzantine culture.

It is, however, preferable to allow that in these introductions the Byzantines might have been doing exactly what they wanted to be doing: framing and locating legal normativity in an intentionally ornate, literary manner, i.e. "rhetorically".

If this perspective is adopted, one of the most basic and curious characteristics of these introductions – perversely enough – suddenly becomes their *lack* of interest in clear conceptual formulation of canonical jurisprudential "introduction" at all. Sustained and clear theoretical articulation of fundamental legal distinctions, categories, or doctrines simply does not seem to be a priority.

It is in fact exceptionally difficult to identify even one clearly and definitively expressed legal concept, distinction or principle in these introductions. With a little effort, it is possible to distill – to "mine" – something of a source theory: legislative authority is formally conciliar, canonical legislation is to be authentic, validity may be

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[99] See the references in Introduction nn. 27, 28, especially Ries 1983 and Pieler 1978; also Corcoran 1996,3-4; Fögen 1995; Honig 1960; Hunger 1964; Lanata 1989; Voss 1982.

[100] This is broadly true, I would suggest, of the studies of Fögen 1995, Honig 1960, Hunger 1964, and Ries 1983. This is part of a much broader tendency to see any complex literary fashioning of legal texts as a de-legalizing of these texts. See also Honig 1960,39-40 on the earlier work of E. Vernay.

[101] Again, Stroux 1949 is to some extent an exception (and following him Honig 1960, see esp. at 40-41), but these treatments tend to be focused on the doctrinal influence of fairly specific rhetorical concepts and techniques, and not the texture of the system as a whole.

universal or regional, and a vague hierarchy of sources may be discerned (councils, then fathers). Other quasi-technical legal or legal-like concepts also appear: the distinction between the "letter" and "mind" of the law (in τὰ μὲν σώματα 37),[102] or the idea of ratification (e.g. κυρο- vocabulary in Trullo 2). But all of these ideas are mostly occasional and vague, not pursued in any length or sophistication, and appear almost in passing: it is certainly not a *primary* concern of the tradition to provide a clear, consistent exposition of the sources of law, [103] or the criteria for formal validity, or the nature of legal interpretation.

Instead of sustained formal legal-doctrinal exposition, the energies of the introductions seem to be directed elsewhere, towards a much looser, much more ornate and literary presentation of the law.

This immediately raises the thorny legal-theoretical question of what might be gained by the framing and locating normativity in such an ornate, literary manner.

The answer may be very simple. This "rhetorical" or, better, literary mode of presentation is very good at doing exactly one thing: embedding or enmeshing normativity in broader narratives. Although anathema to modern formalist instincts, this embedding of the law within a fluid, polyvalent literary framework is perhaps the single most obvious and central dynamic of the introductions. The literary fashioning of law consciously places the emphasis on connectivity with multiple contexts, and keeps the normative processes firmly anchored in, and in a sense subordinate to, a broader, more generalized set of values and world-view. Law becomes, in effect, one more aspect of broader narratives of the right and wrong, of justice and injustice – and indeed, of ancient literary *paideia* generally. It has sometimes been remarked that the tendency in antiquity is to transform almost all realms of knowledge into a subset operation of general literary learning[104] – it seems that law is no different.

The results are conceptually messy, but in a world view which may place more emphasis on cultural and educational control of behaviour than rule-control, understandable, and probably effective.[105] Certainly this tendency points towards an overall legal-theoretical orientation favouring the resolution of disputes and the maintenance of order via substantively equitable solutions and negotiations – i.e. as in

[102] This is, of course, a very general rhetorical and philosophical concept; see Stroux 1949; Triantaphyllopoulos 1985,23-24.
[103] Certainly nothing contradicts Stolte's judgment that "the Byzantines never reached a fixed theory of legal sources" Stolte 1991b,545 n. 5; see also Stolte 1991a and Burgmann 2003,252 n. 13.
[104] See especially Marrou 1948 *passim*., but also, for example, Brown 1992, Carney 1971,91, Morgan 1998,94-95.
[105] See Brown 1992; Lendon 1997.

Weber's "substantive rational" systems, where the truly just solution to every problem is sought – and not via formally correct techniques, doctrines and procedures that produce "legally" or conceptually correct solutions – i.e. Weber's "formal rational" systems.[106] In such a substantive system, the critical problem is not legal-conceptual coherence or consistent application of legal language, techniques and doctrines, but maintaining consensus around the broad metaphysical narratives of justice that must be constantly invoked to demonstrate a given judgment is "just". For such systems the primary focus must thus necessarily be the constant embedding of legal discourse in these narratives of substantive justice – this is a *functional* requirement for the system. And this is precisely what the Byzantine introductions seem to be doing. Clear concepts and bare rule-content may well exist in this world – as they do in Byzantine canon law – but they are not the primary concern of legal exposition.

The rhetorical character of the introductions should not therefore be considered extrinsic to their legal substance, but an essential element of it, and indeed a critically important guide to the nature of Byzantine canon law. The legal "message" of the introductions is precisely that law *qua* law is supposed to be rhetorically framed, that is carefully embedded in broader value narratives – and indeed, it must be.

Finally, we must not overlook a further, rather unintuitive implication of this literary stylization: law is supposed to be beautiful.[107] Although the tortuous periods of Scholastikos or the Trullan Προσφωνητικός may no longer seem as elegant as they once did, the intention is undoubtedly to fix the canons in a suitably aesthetic setting.[108] This further emphasizes the belief that law not be considered as a "plain" and technical formalist mechanism of rules, but as part of a much broader cultural discourse where it is essential that good ordering and aesthetic expression be connected. We may also remark that what would seem to be the most fundamental concepts in the introductions – those pertaining to the very nature of canon law, set at the beginning of the prologues in the "doctrinal" sections – are generally the most ornamented and "beautiful". As odd as it may seem, in this world, the greater the *content*, the greater the rhetorical stylization.

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[106] Weber 1925,224-256 *et passim.*

[107] See *Tanta* on the laws in the *Digest* coming to a *novam pulchritudinem* (liv.11), or *Deo Auctore* on the *Digest*: *...oportet eam pulcherrimo opere extruere...* (xlvii.12); cf. Pieler 1978,351-362 ("Rechtliteratur als Kunstform?").

[108] In this connection it is interesting that Beneshevich reports a number of scholia that are directed to pointing out aesthetically pleasing constructions in the canon. *Sbornik* 145 n.2.

2. Embedding the canons: fundamental contexts and referents

The Byzantine introductory tradition is best conceived as an attempt to locate the canonical endeavour within a number of significant contexts and narratives. As already suggested, one of the most significant aspects of this process is that the introduction contain very little that is narrowly technical or specialized, legally or otherwise. Most of these contexts, images and motifs invoked are instead quite commonplace. The few semi-technical legal terms and concepts that are present (aside from the κυρο- vocabulary, and references to "word" and "mind" of texts mentioned above, we might also note the semi-technical "referring" language of ἀναφέρω in Constantinople and Antioch[109]) are assumed to be well known, and probably were by anyone capable of reading these texts in the first place – they are certainly not dwelt upon. In no way, then, are the introductions primarily inducting the reader into a specialized and proprietary technical world. Rather the movement of the introductions is towards the general and well-known. Canon law is being written *into* a common code of Greco-Roman and Christian learning – not out of it, and into its own proprietary world. To understand canon law is to be versed in a wide array of cultural associations and allusions, not in a specialized realm of technical doctrine.

The single most prominent agenda of the introductions is the location of the canons within the Christian "story" of salvation. As noted, this is most explicitly developed in Trullo, but also evident in the οἱ τοῦ μεγάλου θεοῦ and also Gregory of Nyssa. The canons become an instrument in the unfolding the great Paschal drama of salvation, of which the main players are God, Christ, the spirit, the devil, and the saints. As such, the canons have a cosmic significance, whose horizons easily open up onto the next world – as evident, for example, in the Apostolic epilogue, but also in τὰ μὲν σώματα, if here in a highly Platonized form.

In II Nicaea 1 the canons become woven so deeply into the Christian "story" that they emerge as quasi-scriptural in themselves: the canons can be cast as the OT law or even the NT "law", the Gospel. II Nicaea 1, however, is only the acme of a much broader tendency of locating the canons firmly in a Scriptural literary matrix. Its simplest form is the appropriation of a number of obviously Scriptural images: for example, the Good Shepherd, the language of the "royal way", and even the constant

[109] The term ἀναφορά is often a translation for *suggestio*, or *relatio* an official report or petition to the imperial chancery. Its use in these canons is somewhat looser.

references to the canons/law being about "life", a common OT theme.[110] Even very early in the tradition canonical material or actions can even be glossed directly by Scripture: the image of the canons as the "knife of Spirit" in οἱ τοῦ μεγάλου θεοῦ is an excellent example. Scripture and the canons clearly form a continuous trajectory of salvation and ordering, the latter rooted in the former, but nonetheless of very similar substance and function.

Similar in effect is the tendency of casting the canons as first and foremost an Apostolic project which is then continued imitatively by the fathers. The first line of οἱ τοῦ μεγάλου θεοῦ is perhaps the most explicit articulation of this idea, but the idea in Trullo of "each generation" continuing the battle with the devil, or the tendency of speaking about the canons as prototypically "of the Apostles and fathers", coveys the same idea: the canons are always an Apostolic-then-patristic endeavour. From the 6th C onwards, this concept is realized in the shape of the corpus itself, when the Apostles literally head canonical legislation, and thus becomes part of the physical architecture of the system as a whole.

Not surprisingly, the canons become easily cast as divine. Although we did not remark it closely above, this is most obvious in patterns of sacral epithets. The canons are thus θεῖοι νόμοι in οἱ τοῦ μεγάλου θεοῦ (4.18), θεῖοι κανόνες in εἰς δόξαν θεοῦ (Heimbach 1838,208.3), ἱεροὶ θεσμοί in τὰ μὲν σώματα (12), ἱεροὶ κανόνες in Trullo (52.108.1 and Trullo 2), θεῖοι κανόνες in II Nicaea 1, and both ἱεροὶ κανόνες and ἱερολογίαι in ὁ μὲν παρὼν πρόλογος (27-28). Very characteristic of the civil laws as well, these epithets become virtually formulaic by Trullo, whereafter they occur by default.[111]

Equally evident is the implied deification of the canons in their divine and spiritual origin: they are defined directly as a "gift from God" in τὰ μὲν σώματα, the Holy Spirit himself has authored, or at least co-authored, them in οἱ τοῦ μεγάλου θεοῦ and Antioch (in the former "divine grace" also plays a role), and in II Nicaea 1 they all shine straight from "the same Spirit". Their salvific end, already mentioned, also leaves little doubt about their numinous character. In this too the canons are stepping into a very common, and increasingly pronounced late antique and Byzantine pattern of

[110] For examples of this last, Deut. 4:1 or 5:33.
[111] For examples from the secular legislation, see Enßlin 1943,73-74; cf. Wenger 1942,98-100 with examples from Justinian of both laws and canons as "sacred". In the canons, see for example Trullo 26, 33; II Nicaea 10, 11; Protodeutera 10, 11. Earlier, Cyril 1.

casting law and legislation as essentially divine and heaven-sent.[112] Hess is quite wrong to see a diminution in this idea during and after the 5th C; it remains constant and, if anything, in the Byzantine tradition, especially in Trullo and II Nicaea, *increases*.[113] Sohm was well aware of this important first-millennium dynamic.[114]

This divine and salvific nature of the canons is nuanced in one important way: a consistent pattern emerges of joining and assimilating, yet simultaneously subordinating, the canons to faith or Scripture. This double pattern of "faith/Scripture/doctrine and *then* the canons" is never a clear conceptual doctrine or distinction (cf. the later distinction between *ius sacrum* and *ius humanum*[115]), but it nevertheless emerges as a recurring theme in the introductions, a fundamental fold in the fabric of the tradition. Important examples include the Nicene prefacing, the division of conciliar work in Constantinople, the pairing of Trullo 1 and 2, and the assimilation of the canons to Scripture in II Nicaea 1. Indeed, it represents the canons' fundamental self-situation within the tradition: the canons are always together with Scripture/faith, with a similar goal and function, and assimilated to them, but nevertheless following them, and never totally identified with them.[116] The distinction and relationship between θεωρητικά and πρακτικά in later Platonic philosophy is likely a critical context for this distinction.[117]

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[112] On the immense issue of the sacrality of laws and the legislative process in Greco-Roman legal and political thinking, and its connection with the idea of a quasi-divine legislator, Dvornik 1966 remains the richest and broadest resource; see also Harris and Wood 1993,147-148; Hunger 1964,49-81; Kleinknecht and Gutbrod,1967,1025-1035; Ries 1983,120-121, 221-222; Scharf 1959,68-70. On the ever-increasing dominance of the divine-origin of law in Byzantium – to the point that the emperor himself seems to become eclipsed as a real source of law – see especially Fögen 1987 and Lokin 1994. This may be viewed as the legal consequence of the increasing 4th C representation of imperial power as a semi-divine institution, mediating between heaven and earth – itself and old Platonic and Hellenistic theme (God, of course, being the measure of the political order: *Laws* 716c); see the references above in the Introduction, n. 50. For ancient near-eastern precedents, see the short summary with further references in Raaflaub 2000,50-57. These concepts are, of course, present in the *CJC* prolegomena; see the famous dedication of *Tanta* (*in nomine domini dei nostri ihesu christi*) or its blunt ascription to heavenly authorship (*Tanta* pr); also *Deo auctore* 5 in which *cumque haec materia* [for the *Digest*] *summa numinis liberalitate collecta fuerit*), and its conclusion, at 14, in which the *Digest* is *deique omnipotentis providentiae argumentum*. A classical example of the emperor as divine legislator is *CTh Gesta* 3 where copies of the code are received from the emperor *manu divina*. See Enßlin *ibid.* for further, similar examples.

[113] Hess 2002,76-77, *contra* Sieben; here too Hess is over-anticipating a much later medieval western narrative, in this case the separation of law from theology and morality, and of a clear doctrinal distinction in canon law between the *ius sacrum* and the *ius humanum*.

[114] Sohm 1923,2.68-77

[115] Sohm 1923,2.85-108, and so Afanasiev 1936,55-57 and Patsavos (Kapsanis) 1999,186, rightly view this distinction as a rather odd development; divinity is virtually a constitutive characteristic of ancient church law.

[116] For such pairings in the Justinianic legislation, see Wenger 1942,125-129.

[117] See especially O'Meara 2003, particularly with his emphasis on *both* aspects as part of the ascent to θεωρία, and the notion of a constant ascending-descending interplay between the two in this process. Neither an absolutely clear distinction between the two, nor a total assimilation, ever seems possible – very much as in the relationship between Scripture/faith and the canons in the Byzantine canonical

Another omnipresent discourse in the canons is the tendency to view human organization and order in overwhelmingly moral terms, and particularly moral-psychological terms. With deep roots in the Greek vision of law as a pedagogue to virtue, law becomes so overwhelming intertwined with virtue and morality that to attempt to separate "law" and "morality" in this tradition is almost ludicrous: the two are clearly, and intentionally, held together.[118] Thus the practical effect and function of the canons is repeatedly expressed primarily in moral and psychological terms of, for example, "rectifying the life and manner of each" (οἱ τοῦ μεγάλου θεοῦ 4.18-19), of providing a "canon" of a "pious way of living" (τὰ μὲν σώματα 14), of leading the soul upwards to true good (*ibid.* 6), and above all – especially, but not exclusively, in οἱ τοῦ μεγάλου θεοῦ, Trullo and Gregory of Nyssa – of curing and aiding the passions: πρὸς ψυχῶν θεραπείαν καὶ ἰατρείαν παθῶν (Trullo 2). This last medical imagery, an important subset, culminates in Gregory of Nyssa, whose concern to heal "every spiritual sickness" leads him to compose a lengthy treatise on penance as medicine of the soul. This medical theme too has a well established ancient pedigree as a legal association.[119]

Related to this vision of the canons addressing and healing the moral failings of its subjects is also the constant emphasis on the canons as oriented towards "life": the canons lead one, for example, "to a greater and higher...life" (Trullo 52.5-7), and are able to provide πολλὴν ὠφέλειαν...τῷ βίῳ (τὰ μὲν σώματα 21). The canons speak to human existence in a very broad sense – life itself.[120]

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literature. See also Neschke 1995. I strongly suspect that this schema is much more historically useful for understanding the interplay of faith/praxis, belief/discipline, or even the divine/human, in the ancient canonical tradition than the much more commonly encountered recourses to Christological analogies (the church as having a "divine-human" nature) or the interplay of the (medieval!) disciplines of theology and canon law.

[118] When Plato asserts that the only aim of the proper legislator is complete virtue (*Laws* 705d-e, also 630c), he sums up much of the tradition. On this ubiquitous ancient, and especially Greek, tendency to merge law, politics and morality/values – and generally to assimilate the first two to the last – see for example Balot 2006,11-14; Barker 1925,352-353; Cohen 1995,35-59; Dagron 1994,30-35; Dvornik 1966; Jones 1956,12-16; Schoefield and Rowe 2000 (*passim);* Gagarin (on Plato, in particular) 2002,216; Troianos 1992,331-333. See also the Introduction, n. 52, 54. We may of course cite also *Digest* 1.1: *ius est ars boni et aequi*; it is the art of the *good* and the fair. The tendency of Hess 2002,80-85 to oppose morality and legality is not helpful.

[119] Law, government and medicine are closely woven together in Greco-Roman thought. It is a particularly strong association in Platonic thought (e.g. *Laws* 719e; the *Republic* largely casts law and government as therapy of the city/soul); see Dvornik 1966 (especially the references to king as physician at 960); Hunger 1964,103-109; 123-130; Lanata 1984,1989a; O'Meara 2003,107-110.

[120] Cf. the idea of obeying the commands of the law "that you may live" in, for example, Deut. 4:1 or 5:33, or the law as a *magisterium vitae* in *CTh Gesta* 4, or laws addressing τὸ πολύτροπον τῆς τοῦ βίου καταστάσεως in Leo's *Prooimion* to his novels (Noailles and Dain 1944,5).

Also far reaching is the persistent association of canon law with teaching. This is also a major association for law in Greek literature, and closely related to the idea of law as the moral correction of the "life" of the body-politic.[121] Law is essentially a realization of, and aimed at, the constant (moral) re-education of society. Lawlessness in Trullo is thus, for example, about ignorance and "forgetting" of virtue (52.7-15) that must be corrected through the luminaries and teachers of the church (49.6-8). Law itself is even defined as a "useful teaching" (χρηστὴ διδασκαλία – τὰ μὲν σώματα 16-17) and a number of the Apostolic Epitome sections are titled "teaching of.."; and of course Basil presents himself as above all teaching – and so being taught.

Numerous other more specific images and concepts also anchor the canons firmly within broader late antique legal-political discourses. The canons are thus concerned with σοφία, εὐταξία, συμφωνία, ὁμόνοια, and the φρονιμόν. Here we may also count the occasional emergence of honour/shame language, as well as the *Amtsweisungen*-like progression of the Apostolic Epitome. Broadly, in fact, the conceptualization of the law in shepherd and "way" imagery, and, as noted, even divine, may all be read as recognizable and quite regular elements of the symbolic and linguistic world of Greco-Roman legal-political ideology.[122]

In short, the canons are deeply embedded in a rich and overlapping network of narratives and images from Scripture, Greco-Roman philosophy and ancient law: far from emerging as a carefully defined and demarcated, possibly "autonomous" realm of normativity, the canons are glossed and assimilated into a huge array of cultural referents. The instinct is in fact to link and to connect to as many relevant contexts as possible.

3. One special context: the civil law

A critical question of much modern scholarship is how Byzantine canon law negotiated its identity with Roman civil law. This question was perhaps not quite so pressing for the Byzantines themselves. Trullo and II Nicaea 1, for example, are

[121] The association of law and teaching and gaining (true) knowledge is profound in ancient Greco-Roman thinking; see (again) *CTh Gesta* 4 on the law as a *magisterium vitae,* or Plutarch's Lycurgus "attaching the whole task of legislation to education" (*Life of Lycurgus* 13; ed. Lindskog and Zieler 1957). For Plato and Aristotle law and politics is virtually an extended program of self- and city education: law both is and assumes education. On this immense theme, see the references in n. 118 above; also Brown 1992, 35-70; Jones 1956,5-8; Romilly 1971,227-250; Ries 1983,104-126; Too 2001; cf. also Dvornik 1966 on mimesis, and especially rulers providing an example for imitation (citations at 963).
[122] For all these images and terms, see broadly Barker 1925, Dvornik 1966, Hunger 1964, Ries 1983, Schoefield and Rowe 2000.

arguably more interested in establishing the canons' identity vis-à-vis the Scriptural law than the civil (a concern, incidentally, shared by contemporary Byzantine secular prologues, and not, therefore, a substantive point of contrast with the secular law!).

Nevertheless, this problem is not altogether ignored in our texts. Indeed, in the earliest extant prologue, οἱ τοῦ μεγάλου θεοῦ, the civil law emerges almost immediately as a foil for understanding and defining the nature of church law. The topic may be read as very obliquely broached in τὰ μὲν σώματα as well. In both cases, however, this negotiation is very nuanced and subtle, and does not permit reduction to simple doctrines or clear principles. It is, indeed, a prime illustration of the textures of this very conceptually "messy", literary-rhetorical approach to shaping and imagining law.

The ambiguities of this negotiation are immediately evident in οἱ τοῦ μεγάλου θεοῦ. On the one hand, the prologue begins with an apparently strong and clear point of distinction: penology. According to Scholastikos, the civil laws seek to harm, while the canon law seeks to protect, guide and heal, and in this the church leaders are above acting as "good shepherds".

A little later we also encounter another explicit distinction: the fathers did not decree "political" or civil laws but "divine": νόμους τινὰς καὶ κανόνας οὐ πολιτικούς ἀλλὰ θείους... ἐξέθεντο.

These distinctions, however, within the broader context of Greco-Roman political-legal discourse, ring a little hollow. First, late antique civil law – and at least the Greek civil-legal philosophical tradition – may easily speak of itself as protecting, guiding and healing: both medical and shepherd imagery are not especially foreign to it.[123] Scholastikos is thus in a sense distinguishing canon law from civil law with a pool of common "secular" legal images.

The use of "divine" as, apparently, a point of distinction from the "secular" laws is also strangely ambiguous. As noted, referring to laws as divine is an entirely normal convention of late antique civil law.[124] Indeed, the constant epithetizing of the canons as "divine" might elsewhere be understood as precisely a means of *assimilating* church law to civil legislation. Here too, then, the canons are being distinguished from the civil laws, but with common "secular" legal concepts – even if this one does not sound so today.

[123] See nn. 119, 122.
[124] See n. 111.

It is likewise curious that in the phrase cited above, νόμοι and κανόνες are used synonymously. This is also true later in the prologue (4.21), and in Title 48, where the canons are clearly referred to as νόμοι. Despite the fact that κανών is already a reasonably technical term for church rules in the 6th C, and the term itself could be used to distinguish the ecclesial and secular laws – and elsewhere often is (see chapter three) – the two terms here form a hendiadys. The two types of laws are distinguished solely on the (ambiguous) basis of θεῖος.

Another level of ambiguity emerges in the fact that this "divine" church law is immediately glossed by an allusion to a stock legal definition: νόμους τινὰς καὶ κανόνας οὐ πολιτικούς ἀλλὰ θείους **περὶ τῶν πρακτέων καὶ μὴ πρακτέων** ἐξέθεντο. Although applied here to "non-secular" divine laws, this is an absolutely conventional secular-legal "definition". Its application to church legislation is thus an important example of legal-theoretical appropriation, and clearly locates canonical norms within the normal parameters of Greco-Roman legal thought. Here, however, even another layer of ambiguity emerges – for us at least – as this definition is not exactly a *proprietary* technical or juristic legal definition in the modern sense: it is general philosophical definition in its original form, and quite moral in tone. So the "divine" ecclesial laws are being defined by a secular-legal definition, but by one much broader than any modern secular legal definition. It is not, therefore, assimilating canon law to any secular law as we tend to know it.

In sum – if one is ready for it – the canonical legislation is being distinguished from secular legislation with secular legal images, defined as non-secular by a common "non-legal" secular-legal definition, and being identified as non-secular with a common secular legal epithet that does not sound secular today – while being referred to with secular-legal terminology!

A similar ambiguity may be found in the appropriation of the Demosthenic definition of law in τὰ μὲν σώματα. Here it is again striking that a common secular-legal definition of law is immediately and easily applied to the canons. At the same time, however, the definition is rhetorical in origin, and extends far beyond the scope of any modern technical-legal, juristic definition of the "legal"; by modern standards, it is hardly "legal" at all. At the very moment of its appropriation it is, in any case, bleached of its most secular-legal content, and turned into something more proprietary. The dynamic of this appropriation is thus very similar to that in οἱ τοῦ μεγάλου θεοῦ: one easily reaches for commonplace, secular-legal concepts and images to define the

canons, but the canons are actively distinguished from the secular law in this very act of appropriation – and the definition and images are not particularly "legal" by modern standards in any case.

It is thus very difficult to formulate a clear, coherent legal-doctrinal description of the relationship between the civil and ecclesiastical laws from these prologues, and particularly one that is meaningful today. The complex interweaving and stacking of philosophical and legal associations simply does not permit it – and obviously reveals little interest in such a definition, and even in such a way of thinking. The best that can be said is that both prologues broadly locate church law within the *general* Greco-Roman discourse and symbolic world of law. At the same time, though, both are keen to point out particularities in origin, function and ultimate goal vis-à-vis certain aspects of secular (Roman) civil law: different penology; a difference, apparently, in the type or degree of "divinity"; and perhaps a *more* eschatological, moral, medical and pastoral orientation. In all of this the church law does not emerge as an entirely different type of normativity than secular law: both are properly (ancient, non-positivist, non-juristic) "law". But church law certainly does not emerge as a direct, technical imitation of secular Roman law either – and certainly not of any type of secular legality we might recognize today.

4. Sources and legislation

Of the more conventional legal-introductory preoccupations present in the Byzantine introductions, assessment and delineation of the canonical sources is the most prominent. This naturally involves reflections, direct and indirect, on the nature of valid rule-recognition and of the process of canonical legislation generally.

As already noted, some of this reflection approximates the contours of modern source theory. Sources may be weighed in terms of origins and scope (local/universal), authenticity, and harmony of content (i.e. of patristic material with conciliar). A tendency to arrange the sources in a hierarchy is also evident: apostles, councils, fathers. There is further an obvious concern for listing and delineating the canonical sources – i.e. for marking the limits of the valid rule-world.

Likewise, a process of legislation is clearly presumed that is both ongoing and even more or less instrumental (in the sense of laws conceived as a means of addressing specific problems that arise), suggesting a modern-like positivism. Thus in οἱ τοῦ μεγάλου θεοῦ legislation is depicted as emerging at many different times, for different

reasons, to address different problems: ὡς ἀπήτει τὰ κατὰ χρόνους ἀναφυόμενα (4.20-24). This sentiment is echoed in τὰ μὲν σώματα (15-16), and especially ὁ μὲν παρών: many new problems arise "in life" (ἄλλα τε κατὰ τὸν βίον οὐκ ὀλίγα ἐνεωχμωσε) and synods are convened to address them (8-9). It is perhaps most strikingly, if a little obliquely, expressed in Trullo where Christ is portrayed as raising up "in each generation" (καθ' ἑκάστην ...γενεάν) champions to wage war against the devil, to shepherd the flock, and teach the wayward (104.3-105.12): i.e. Christ constantly raises up leaders to guide the church, such as the canon-writing fathers at Trullo. Conciliar legislation is a constant, expected, and normal aspect of church law.

These similarities are nevertheless deceptive. The overall picture painted by the introductions remains quite foreign to modern legislative sensibilities. Far from constituting simple mundane instruments of a competent formal legislative authority and created to enact policy, the canons are ultimately a highly numinous reality, authored by the Holy Spirit, and directly following from the Apostles. Thus the canons continue to issue above all from the "the fathers", an important and loaded concept: these are the traditional charismatic, spiritual successors of the Apostles, guardians and transmitters of the faith, and whose role is highly embedded – quite obviously in Trullo – in broader Christian narratives of salvation. Thus, while the modern positivist-like concept of a formally defined legislative organ (the council) regularly meeting to issue valid legislation is present, it is not, as it were, the central point: positive legislators really only emerges inasmuch as they can be glossed as divine and numinous, which is the real emphasis of the introductions. In effect laws in this world are really become laws not through the exercise of formal authority but through their substantive reality and recognition as divine and salvific. "Making law" is thus only quite secondarily a mundane, technical process of following valid forms. It is much more obviously the bringing to expression and realization certain metaphysical narratives of healing, teaching, saving, guiding, etc. In this respect Sohm quite correctly understood legislation in the pre-medieval church as fundamentally a "charismatic" process.[125]

This charismatic aspect of lawgiving emerges above all in the casting of the legislative processes as a highly traditional task, and it is in this traditionalism that the dissonance with modern positivism becomes especially pronounced. In this world, law is "validated" and legislative authority established by locating themselves in relation to past authorities. The introductions are thus oddly deferential and backwards-looking:

[125] Sohm 1923,2.63-86 *et passim*

they stress remembering law, receiving it from the past, gathering it, confirming it, and pledging one's loyalty to it. As we have already noted in chapter one, there is little expression of categorical, absolute sovereign authority *over* the laws, for one does not impute or "grant" authority, validity or "force" to the traditional law as much as recognize and affirm the authority, validity and force that they already have – and then derive one's own authority therefrom. The best illustrations of this dynamic are Trullo 2 and II Nicaea 1: precisely as the moment of the exercise of one's "sovereign legislative authority" – in creating new laws – one is most concerned to carefully pledge one's adherence and allegiance to the received law as a sacral whole, and to forbid any tampering or modification of it. One must firmly place one's texts in a traditional trajectory. Similarly, ὁ μὲν παρών is very concerned to note that its additions happily follow on the work of his predecessors: they are entirely coherent with what has gone before. Even the curious defensiveness of Scholastikos suggests that merely rearranging and thematizing the corpus might appear a little *risqué*: the established tradition must never be violated.

This traditionalism never entails the casting of the text as completely ossified. One can clearly always add newer material on top of the older; or clarify, even slightly modify the shape of the corpus and slightly clean-up around its edges (e.g. in separating out the "local" from the "universal" councils, or in making judgments on Cyprian, or the Apostolic constitutions); or express some formal evaluation of new elements (e.g. τὰ μὲν σώματα on Carthage); or produce thematic indices. But all of this is done very guardedly, with constant pledges of faithfulness to tradition and affirmations of the substantive coherence of the new legislation, and, critically – as we would expect from chapter one – with virtually no real expressions of modification of the established material. One always seems to come to the conclusion of Chalcedon 1: "we have judged it right that the canons of the fathers in each synod until now are in force".

In short, the law does not emerge in these introductions so much as an abstract project for radical positivist *construction*, as a concrete set of traditional texts for *reception*. This reception is not without any ability to sort or change; the canons themselves may directly contradict or modify earlier canons.[126] But this movement never entails the categorical ejection of earlier material, and is always cast as traditional in its fundamental orientation – and as surprisingly humble. Newer material is thus never presented as somehow superceding the old – it is presented as the most recent

[126] See chapter 3.E.1.

element in a long tradition: exactly as they appears in the manuscripts, tacked on to the older core.

C. Summary and analysis: the law introduced

The picture of law that emerges from the traditional introductions and framing structures of the Byzantine canonical tradition is complex and nuanced. Although in places it is very familiar, its overall form is quite foreign, and often not very amenable to modern legal sensibilities.

In the context of the previous chapter, the most striking aspect of this picture is its coherence with the broader physical shape of the tradition. It is surprisingly easy to read the introductions as articulating many of the tradition's basic historical and codicological dynamics. Thus the extreme conservatism and stability of the tradition that in chapter one seemed to suggest a quasi-sacral or Scriptural handling of the texts finds an easy complement in the introductions' characterization of the canons as precisely sacred and quasi-Scriptural. The curious lack of clear moments of categorical official legislative definition is echoed in the introductions' highly traditionalized and sacralized treatment of the sources – the Holy Spirit, the divinely inspired "fathers", "divine grace" are the real legislators, not any "present" authority. The problem of the "missing jurisprudence" finds a parallel in the surprisingly un-technical and commonplace content of the introductions, and their predilection for broader contextualizations. Perhaps most dramatically, the apparent expectation that the canonical texts be embedded in broader regulative contexts and narratives finds rousing articulation in these introductions. Even the paralleling of civil and canonical material in the manuscripts – separate, yet still part of a larger whole – vaguely invites the introductions' negotiation of canon law's identity with the civil law.

The "fit" between the physical reality of the tradition and its self-presentations is thus surprisingly good. The introductions can, it seems, be read as "mirrors of the law". The reflection in this mirror, however, is only discernible if we allow that this law is operating rather differently than we might expect. In particular, we must allow that the modern preoccupation of legal introduction with carefully delineating law as an autonomous field of technical endeavour has been replaced by an overriding interest in embedding law in very general value narratives. This world is thus not so much concerned with presenting itself as a systematic jurisprudential project as with anchoring its jurisprudential elements firmly in the Christian story of salvation,

Scripture, divinity, morality, philosophical enlightenment, and Greco-Roman political-legal ideals. In effect these introductions are asserting that to "get law right", one has to above all get these external narratives right – the essence of a substantive justice system. The result is that this world casts law much less as an rather mundane mechanical system of consistent definitions, concepts and techniques which govern a set of (malleable, human) rules, as a strangely numinous *literary* endeavour in which the central concern is providing the right "glosses" to understanding and applying a semi-sacralized body of traditional texts. Formalist legal definitions, concepts and even doctrines still exist in this world, but they are not its exclusive or even primary focus. In fact, we would only exaggerate a little to suggest that these technical elements appear almost decorative or ornamental in these introductions – the real legal content in this system is conveyed through the rhetorical inter-weaving of the canons into substantive narratives of justice and truth.

CHAPTER 3. THE LANGUAGE(S) OF THE LAW: READING THE CANONS

In the previous two chapters we have explored a number of the ways in which the Byzantine canonical tradition presents and introduces itself as a normative system. We now turn to an analysis of how the canons themselves are written as normative texts – i.e. how the canons may be read to describe the beliefs, presuppositions and priorities of their own legal world.

A. Nomenclature

1. Naming the laws: terms for rules

The question of canonical nomenclature has been the subject of considerable scholarly attention, and rightly so. How the canonical tradition "names itself" potentially reveals much about the nature of the system as a whole, and how it relates itself to other normative systems.

Naturally, most discussion has been directed towards the dominant term, κανών. Already in the 14th C Blastares considered it worthwhile to provide in his Προθεωρία an explanation of this term,[1] and short, stereotyped notes on its meaning and significance have since become a standard feature of Orthodox canonical introductions.[2] Similarly, modern histories of canon law rarely fail to discuss the origin and development of the term, at least briefly, and a few articles may be found devoted to its significance.[3] Classicists and even one Romanist have also been keen to study the term, and have produced two major studies of the term's use in classical and legal texts.[4] Recently, Heinz Ohme, a church historian, has published a comprehensive monograph on the Christian use of the term, particularly the phrase κανὼν ἐκκλησιαστικός, where he treats the concept from a highly synthetic viewpoint, taking into account the uses of the term in doctrinal, moral, scriptural and canon-legal contexts through to the early 5th C.[5]

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[1] *RP* 6.5-6; Zonaras earlier makes a very short comment in *RP* 4.81 with reference to the biblical canon. There is no definition in the *Suda*. In the west, explanations of this strange Greek term are earlier, for example in the preface to the 7th C *Hispana* (Somerville and Brasington 1998,57, trans.)

[2] For example, the *Pedalion* (Kallivourtsis 1800) xviii; Christophilopoulos 1965,39; Milaš 1902,11-12; Rhodopoulos 2005,30; Tsipin 2002,15-16.

[3] For example, Erickson 1991a; *Fonti* 1.2.494-502; Hess 2002,77-78; van der Wiel 1991,11.

[4] Oppel 1937, Wenger 1942.

[5] Ohme 1998.

The term κανών is, however, only one term used by the canons to refer to church rules. The following is a survey of all substantives used for church norms within the traditional Byzantine corpus of canons.[6]

Term	Distribution (canons with one or more occurances)
κανών (singular or plural, in sense of a specific church rule)	Ancyra 14*; Nicaea 5, 18*; Antioch 2**, 9*, 19; Constantinople 2, 6; Constantinople 394; Carthage 24, 134, 136, Acta 1; Ephesus 3, 8; Chalcedon 1, 5, 8, 19, 22, 24, 26, 28; Trullo 2, 3***,4, 6, 13***, 16, 18, 25, 26, 29, 30, 33, 34, 38, 40, 44, 49, 49, 51, 53, 54, 55, 61, 64, 94*, 96; II Nicaea 1, 2, 3, 5, 6, 10, 11, 12, 19; Protodeutera 2, 8, 9, 10, 11; Basil 1***, 3, 4**, 10, 21**, 47, 51, 88, 89; Gregory Nyssa 5, 7; Cyril 1; Gennadios; Tarasios (* possibly to be placed in following category) (** meaning shades into the quantitative sense of canon as "penitential tariff"[7]) (***meaning perhaps generic, as in "rule of prayer")
κανών (less specific, if semi-technical, in sense of a synthetic concept of general Christian practice and normativity, verging on "tradition" or "custom")[8]	Neocaesarea 15, Nicaea 2, 6*, 9, 10*, 15*,16*, 18*; Antioch 2; Laodicea 1*; Cyprian; Basil 12; Gregory Nyssa 5 (* possibly to be placed in above category)
ὅρος (singular or plural, in sense of a specific church rule) [9]	Nicaea 15, 17, 18, 19; Antioch 1, 6, 21; Sardica 4, 15, 17; Carthage, 5, 18, 25/70, 86, 138; Chalcedon 4, 10, 14, 20, 28; Trullo 40, 81
διάταξις	Apostolic 3, 49 (but both referring to commands τοῦ κυριοῦ); II Nicaea 1, 4 (but referring to scriptural commands of the apostles), 5, 10; Tarasius; Protodeutera 9
διάταγμα	II Nicaea 1 (for "ordinances" of the councils)[10]
διαταγή	Basil 88[11]

[6] This survey covers all terms for any type of Christian rule, whether the rule is extant and/or in the corpus or not. It does not include very general references to Christian tradition, most references to custom (ἔθη, ἔθος, συνηθεία – on these see below nn. 185-187), and most vocabulary that might be viewed as common Greco-Roman parliamentary usage (i.e "decision", "judgement" or "sentence" language, such as ἀπόφασις, γνώμη, κρίσις, ἀπόκρισις, ψῆφος – all of which occur in the canons.) Further, it does not take account of the many verbal nouns used to refer to decisions and norms, such as τὰ ὁρισθέντα (frequent; especially in Carthage – also τὰ ὡρισμένα, as Constantinople 2 or Antioch 19), τὰ θεσμοθέντα (Trullo 81), τὰ δόξαντα (fairly common, e.g. Athanasius to Rufinianus), τὰ ἐκδοθέντα (e.g. Tarasius), τὰ τετυπωμένα (Ephesus 1), or τὰ διατεταγμένα (Trullo 28).

[7] Although this meaning may be considered simply a subset of the "specific" rule meaing, i.e. a specific rule of punishment. See then also Ancyra 24, Gregory Nyss. 4, Basil 1, 30, 79, 80, 81, 83.

[8] This usage is not, of course, to be confused with the sense of κανών as "register of clergy" (e.g. Nicaea 1, 16, 17, 18; Antioch 1, 2, 6, 11; Chalcedon 2; Trullo 5).

[9] A penitential tariff usage for ὅρος also appears (in Ancyra 6, 19, 21, 23). Some of the usages noted in the chart also have a strong sense of "measure", e.g. Trullo 40.

[10] cf. Trullo 28 διατεταγμένα.

[11] This is the only instance where the term clearly applies to a specific church rule; in II Nicaea 1, however, it is applied to canonical regulation more generally (ἐνστερνιζόμεθα καὶ... τὴν αὐτῶν [τοὺς

νόμος (referring to concrete church rule)[12]	Nicaea 13; Protodeutera 17; Hagia Sophia 3; Basil 24, 50; Theophilus 13 In Basil 24 (ἀνδρὶ δὲ χηρεύσαντι οὐδεὶς ἐπίκειται νόμος) and 50 (τριγαμίας νόμος οὐκ ἔστιν·ὥστε νόμῳ τρίτος οὐκ ἄγεται) the usage is vaguer, shading into "customary penitential tariff". This may be true for Nicaea 13 as well; nevertheless, in each case a fairly specific church rule seems to be envisaged. See also Basil 20 (mentioning νομοθεσία τοῦ Δεσπότου), 87 and Theophilus 14 where νόμος is more obliquely applied to church regulation as a whole.
θέσμος	Antioch 3, 11, 23; Ephesus 8; Chalcedon 12; Trullo 84; Hagia Sophia 2, 3; Basil 87; Cyril 3, 5 This term frequently, if not always, seems to refers to more general, unwritten rules[13]; once, in Antioch 11, it seems to approximate the synthetic singular use of κανών. cf. also II Nicaea 7 θεσμοθεσία for "written and unwritten" traditions of the church.
(τύπος)	(This term is never used as a general designation for church rules per se,[14] but comes close in its meaning as "formula" or pattern for penance or procedure in Nicaea 19; Carthage 49; Gregory Thaum. 5; Basil 3, 7, 76, 78; Theophilus 7, 12.)

We may also note the usages found in common introductory material.

Term	Distribution (sources)
κανών (specific usage)	*Epigraphs and listings in traditional πίνακες*: all, without exception, where rule terms appear. *Short historical notices* (from *Kormchaya*): Constantinople *Introductory structures (prosphonetikoi, letters)*: Constantinople, Trullo, Gangra (epilogue), Antioch, Carthage *Prologues*: οἱ τοῦ μεγάλου θεοῦ, τὰ μὲν σώματα, ὁ μὲν παρών
κανών (synthetic usage)	*Introductory structures*: Gangra (letter)
ὅρος	*Historical notices* (from *Kormchaya*): Laodicea *Introductory structures*: Constantinople (possibly only for doctrinal decrees); Gangra (letter), Carthage *Prologues*: τὰ μὲν σώματα
νόμος	*Prologues*: οἱ τοῦ μεγάλου θεοῦ (also in Title 48)
θέσμος	*Prologues*: τὰ μὲν σώματα, ὁ μὲν παρών

κανόνας] διαταγὴν), and in II Nicaea 20 to the monastic teaching of Basil; also, in Apostolic 85 it appears in the title of the "Apostolic Constitutions" (αἱ διαταγαί).

[12] Most instances of νόμος in the corpus refer to secular laws (e.g. Chalcedon 3, 18; Trullo 34, 71; Carthage 56 (acta), 93, 99, 102, 117, 119; Protodeutera 6) or the Old Testament (e.g. Apostles 63, 41; Trullo 33, 70, 82; II Nicaea 6; Basil 3, 87). Gregory Nyss. 4 makes a passing reference to ὁ νόμος τῆς φύσεως.

[13] So Zonaras: θεσμοὺς δὲ τοὺς ἀγράφους τύπους λέγει, καὶ τὰς ἀρχαίας παραδόσεις ἐνταῦθα, νόμους δὲ τοὺς ἐγγράφους (*RP* 2.710).

[14] It is, however, probably used twice in a more general sense to designate secular laws: Ephesus 8, Chalcedon 17.

This data raises four questions : a) which terms are used; b) which terms are not used; c) what is the significance of both of these phenomena; d) and what developments may be noted. Three immediate observations may be made.

First, and most simply, it is clear that a variety of terms can be used to name church rules. Here the common tendency of the tradition to stack and juxtapose differing usages, one on top of another, is very evident. A disinclination to strict terminological rationalization is obvious.[15]

Second, it is equally clear that the term κανών becomes increasingly, if never totally, dominant. Its only serious competitor, ὅρος, fades almost completely by the second wave.[16] By the 5th C, as is widely recognized, κανών is clearly emerging as an at least semi-technical term for church rules.[17]

Third, despite a general congruence with standard Greco-Roman administrative and legal rule vocabulary (all of the above terms are attested in some type of Greco-Roman regulative-normative use), a number of prominent and formal late Roman secular terms for laws, most notably νόμος and διάταξις (*constitutio*), are conspicuously, if not totally, absent as terms for church rules.

These observations lead to one simple but significant conclusion: the pattern of terminological self-designation of the body of Byzantine church law clearly conveys a sense of its own self-conscious existence as a special body of rules with (increasingly) a proprietary nomenclature – and that it is distinct from civil law. In other words, the canons tend to talk about themselves as "the canons" in a sense close to the modern usage: as a coherent and demarcated set of church rules within Byzantine normative culture.

At the same time, this data precludes the idea that the canons *cannot* think of themselves in any other way. In particular, it challenges any overly-doctrinal reading of the significance of κανών for Byzantine church-legal culture. The impression is rather that the canons see themselves as broadly part of large and rich world of normative ordering, the terms of which they may freely use.

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[15] This is true in later Roman secular (and papal) legislation as well; fairly technical distinctions and "official" terms can still emerge, but the overall picture is quite blurry. See for example Corcoran 1996,198-203; Maassen 1871,228-229; Mason 1974,126-131; Jolowicz 1952,478-479; Wenger 1953,531; Wieacker 1988,19.

[16] Although its corresponding dispositive, ὁρίζω, becomes increasingly regular. See section C below.

[17] See Ohme 1998 *passim*; see for example its regular and casual use throughout the *acta* of Chalcedon. In imperial legislation is becomes especially common in the 6th C onwards, but appears occasionaly already in the 5th C: Wenger 1942,87-88 *et passim*.

The growing dominance of the term κανών is nevertheless unmistakable, and raises the question of the meaning and significance of this term for understanding Byzantine church law, and the reason for its preferment. This problem has exercised the scholarly literature for some time. Very broadly, two theses have become attached to the term, both of which make the word bear considerable – probably too much – weight in our understanding of the very nature and development of church law.

The first thesis, which we may term "canonical exceptionalism", is common in some modern Orthodox presentations of canon law. This view tends to read the use of term κανών doctrinally, and almost ontologically: it is understood to mark church rules as distinct in their very essence from secular "laws" (νόμοι) and as thus signaling – at least early on – a fundamental difference between ecclesial and secular legal cultures, or even of the lack of an ecclesial legal culture.[18] The precise nature of this difference (or lack) is often left unclear, but the implication is that canonical legality is not characterized by the patterns of legal formalism-positivism detailed in the introduction. Canon law functions with its own distinct and special sense of rule, and thus has its own distinct and special term: κανών. In these readings, this term is thus understood to denote a more open, informal type of regulation than "laws": "guidelines" is a common suggestion.[19]

The second thesis, which we may term "from the canon to the canons", has been the subject of more sustained scholarly exposition, most recently in the hands of Erickson and, above all, Ohme.[20]

This thesis suggests that early Christian rule culture is centered around a unified, synthetic concept of *the* canon of the church, the κανὼν ἐκκλησιαστικός which encompasses dogmatic, behavioral/moral and church order normativity. Early synodal and patristic rules, it is argued, are self-consciously only specific expressions of this basic apostolic κανὼν τῆς ἐκκλησίας, as applied in concrete instances. They are thus prototypically ὅροι that bring to bear *the* canon, and not κανόνες themselves. When κανών is found in more specific and plural uses in earlier texts, it is at the very least

[18] Especially strong expressions include Afanasiev 1936 and Deledemos 2002,14-31 but it may be felt as a diffuse background assumption or implication of much of the literature noted in the Introduction in n. 9 above, for example Erickson 1991a,14-20, Yannaras 1970,174-193. See also Archontonis 1970,15-16, where this reading is rejected, and L'Huillier 1964,112. In the most relevant non-Orthodox literature, Schwartz may be counted here (1936a,178); the broad trajectory of thought, however, is that of Rudolph Sohm, for whom "law" (read: modern conceptual-formalist law) is considered antithetical to the essence of the church: "**Das Wesen des Kirchenrechtes steht mit dem Wesen der Kirche in Widerspruch**." (concluding line of Sohm 1923,1.700; emphasis original).
[19] So, for example, Patsavos 1981,108; Schwartz 1936a,178.
[20] Erickson 1991a; Ohme 1998; Hess 200,60-89 adopts and develops Ohme's work.

never referring to concrete synodal decisions which themselves have pretensions to the authority of "the canon", but to much more customary and traditional rules – which, it is argued, are understood as in their very essence rules of the Gospel or the Apostles.[21] The concept of *the* canon thus precludes the ongoing positivist creation of *canons*.

In the course of the 4th C, according to this theory, a change in usage is observed. First in Antioch (330), and then even more clearly in Constantinople (381), and forever afterwards, κανών begins to refer clearly to earlier synodal enactments, and even to synods' own enactments. Councils thus begin to create "canons". This usage, Ohme argues, was encouraged by the late antique legal schools' interest in secular legal κανόνες (*regula),* short summary legal rules or principles, popular in the increasingly bureaucratized late antique legal environment.[22] This development, a center of which was likely the legal school in Berytos, very near Antioch, a center of canonical development as well, was a key element in the furtherance of this new canonical usage, as it encouraged the conceptualization of church rules as "canons" as precisely such short, juridical legal rulings – with which they would share their name. This conceptualization will thus be applied to the "Apostolic canons", and finds echo in the very form of the short, summary rules of the late 4th C canonical sources, especially the Apostolic canons and Laodicea.[23]

The upshot of this shift is that the older idea of *the* canon of the church became submerged, and indeed, the earlier synthetic usage seems to fade. Church rule culture, it is argued, thus re-centers around positively defined conciliar (and patristic) canons, instead of the old synthetic Scriptural and Apostolic canon/canons, and the distinction between Apostolic ordinances and later synodal ordinances is lost. This opens the door to the onset of legal positivism in which law is conceived as a closed system of constructed rules, and suggests a fundamental severance from the old Gospel-Apostolic centered tradition of rule ordering.[24] By implication, the church's legal system has thus become secularized and legalized, and its own more native, proprietary Gospel-centered orientation lost: "Lost is the early Church's sense of canon as part of the tradition,

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[21] So Ohme 1998 reads, for example, the plural disciplinary usage of κανών in Origen (194-195), or the plural usage in Gangra (401), or the specific usage of κανών in Neocaesarea 14/15 (335-336), Nicaea 2 and13 (363-366).
[22] Ohme 1998,497-498, 508, 580.
[23] In Ohme 1998 develops the connection mostly with the Apostolic material (*ibid.*), but later also connects it with other epitomized collections (e.g. Ohme 2001,775) such as Laodicea, and parts of Carthage; Hess 2002,70-89 in particular sees this development as encouraging the conceptualization of canons of many types by the end of the 4th C as "statutes".
[24] This conclusion is particularly evident in Erickson and Hess.

absolute and universal, maximalist in its vision of church life. Instead, canons are understood to be laws on ecclesiastical matters duly made and promulgated in written form by the competent ecclesiastical authority..."[25] Church rules, apparently, have gone from being based on broad moral consensus on the apostolic κανών to becoming legally binding dictates of sovereign authorities.[26]

It is beyond the scope of this work to examine either of these theses, in any of their incarnations, in great detail. The latter, in particular, extends its discussion far beyond the parameters of our investigation. The basic fault of both, however – and they share the same weakness – may be quickly noted. It arises not out of what they do argue, but in what they do not: neither carefully investigates the phenomena to which their philological investigations are supposed to point. The first thesis never closely examines the actual character or nature of legal discourse in the tradition as a whole, secular or ecclesial, and the second never verifies whether the predicated positivism ever came to pass. If one does investigate these phenomena, it is clear both theories are quite unfounded – or at least very overstated.

The conclusion – or, at least strong implication – of the second thesis, that the late 4th C saw the onset of a modern-like canonical legal positivism is particularly deceptive, and even anachronistic. In effect, Ohme and others have stepped from the 4th C directly into the 19th C, or at least the 12th C. As already noted, research in Byzantine law for the last forty years has shown that the operation and existence of a modern-like, or even medieval-like formalist-positivist legal system is extremely difficult to locate in Byzantine society, at any time, even in the secular law.[27] In the present work too, the picture of 4th and post-4th C Byzantine canon law emerging is already decidedly non-positivistic/formalistic: the entire system is built around carefully embedding normativity in often very vague metaphysical and theological narratives, and most of the trappings and presuppositions of modern formalism (conceptualism, developed jurisprudence, professionalization, clear legislative authorities, constructivism) are strikingly absent. Indeed, many of the canonical system's central concerns, almost obsessions – continuity with Scripture, the Apostles, and broader narratives of Christian order and morality – are precisely those that Ohme and others see as having been lost. The development of legal positivism that is supposed to have begun in the late 4th C simply never materialized.

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[25] Erickson 1991a,19.
[26] Hess 2002,80-81 for this sense of "moral" vs. "legal" rules.
[27] See the Introduction, and references in nn. 32-45.

The first thesis makes the same mistake. It too carries modern western legal positivism-formalism into late antiquity, but now as the unexamined straw-man of all secular legality. Church law, quite correctly perceived to not function in such a positivist way, is then radically distinguished from secular law or even *all* law – and the use of κανών instead of νόμος seems to be a convenient indicator of this. But all law is not modern positivist-formalist law, and so any distinction between νόμος and κανών, even if a conscious doctrinal distinction is intended, cannot be so easily read as a distinction between formalism and non-formalism. Further, it is very evident that the canons do cloak themselves in legal terminology and forms shared with and even derivative from the secular law – including the term νόμος. Conversely, κανών itself has a secular-legal valence as *regula*. The negotiation of identity between the two types of regulations is thus much more complex than a simple doctrinal distinction would seem to allow. To read, therefore, the use of κανών for church rules as a *radical*, ontological rejection of legal positivism-formalism – or even any type of secular legality – is quite problematic.

Despite these problems, there is nevertheless much in both theses of great value for understanding the significance of the term κανών in Byzantine church law. In a sense, the central instinct of both is correct: we should not *properly* be thinking about church law in terms of modern legal formalism-positivism, and the use of the term κανών is in some senses illustrative of this.

The first thesis, in particular, is broadly correct in seeing κανών as distinguishing church regulations from secular. The distinction, and sometimes pairing, between secular νόμοι and ecclesial κανόνες is omnipresent from the 6th C onwards.[28] Further, just as church regulative enactments do not generally call themselves νόμοι or other related terms for secular laws, secular legal enactments, with some relatively small and technical exceptions, do not tend to self-designate as κανόνες.[29] The latter rule is stronger than the former; as noted, it is always entirely possible to speak about church regulations as "laws", and this is evident even in the corpus.[30] But the church laws are

[28] For examples of the pairing of the two in Justinian's Novels, see Wenger 1942,123. A *TLG* search reveals 19 examples in the Novels. See also n. 17. The first instance of the term κανών as a church rule in the secular legislation is *CTh* 16.2.45 (a. 421).

[29] Aside from technical tax-usages, the major exception are the technical jurisprudential *regula* which are translated as κανόνες; see Wenger 1942,72-81. But normal imperial *leges* or ordinances are clearly not called κανόνες (the Latin usage of *regula* is a little broader, Wenger 1942,62-70). Even imperial regulations touching church matters do not call themselves κανόνες; Wenger 1942,123.

[30] Outside of the corpus it is also not difficult to find instances of νόμος language – to say nothing of διάταξις or τύπος language – applied to eccesial rulings. See, from the *TLG,* Sozomen *Ecclesiastical History* 1.23.2 (A particularly interesting example – the rules are laws, but are *called* canons: Ἡ δὲ

usually κανόνες, and secular laws usually *not* κανόνες – and this is almost always true when the two are spoken of together.[31] There are two *Rechtsmassen* in Byzantium,[32] and they do each tend to have their own name.

Ohme is likewise correct to draw attention to the hardening of canonical nomenclature around the term κανών in the late 4th C, and its increasingly concrete sense as a clear written enactment. Although one may quibble with details, Ohme is correct to perceive a movement from earlier general uses of ὁ κανών to more specific and concrete usages. Although I doubt that this witnesses to a true shift in legal mentality any more than the decreasing currency of the old doctrinal vocabulary of κανών τῆς ἀληθείας represented a fundamental shift in Christian belief, it undoubtedly reflected a movement towards greater definition of a fixed, bounded body of rules. This regular and concrete use of κανόνες for church regulations certainly heightens a sense of church normativity as existing as a clearly defined, autonomous body of ecclesial legal literature – which physically, as noted in chapter one, was probably finding increasing expression in dedicated canonical manuscripts. Thus, while the onset of a full-fledged legal positivism is probably not to be imagined, this formalization and "hardening" of terminology is symbolic of a general pattern of the 4th C formalization and standardization of earlier, more fluid patterns of customary regulation and belief-definition. It is perhaps a step in a more positivist direction. Certainly it signals the church's much more obvious possession of its own proprietary written normative system.

Neither thesis, however, has shed much light on the broader problem of why the church settled so definitively on the term κανών for its central written norms. Indeed, no one has yet to discover an absolutely convincing explanation. Ohme's suggestion (followed by Hess), that a central influence were the secular legal κανόνες, is quite weak.[33] Ohme is probably correct in noting that these secular legal *regulae*/κανόνες were increasingly prominent in late antiquity, particularly in the more academically inclined and teaching-oriented jurisprudential climate of 4th and 5th C Berytos – and that

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σύνοδος [Nicaea] ἐπανορθῶσαι τὸν βίον σπουδάζουσα τῶν περὶ τὰς ἐκκλησίας διατριβόντων ἔθετο νόμους οὓς κανόνας ὀνομάζουσιν. Sozomen elsewhere frequently calls church rules "laws"); or Athanasius, *De decretis Nicaenae synodi*, 36.8; or John Chrysostom *Ad Innocentium papam* (epist. 1), or more generally in Chalcedon *ACO* 2.1.3.104 (see Price and Gaddis 2.174 n. 12). Similarly, later scholia to Apostolic 27 and 38 will call the canons ἱεροὶ νόμοι (Sbornik Prilozh. 7-8). A thorough examination of this question would be valuable.

[31] See Wenger 1942,123. This is true throughout the Byzantine period. On the question of νόμοι and κανόνες and their relationship, see Beck 1981, Macrides 1990, Stolte 1991, Troianos 1991.

[32] Fögen 1993,68-69.

[33] Ohme 1998,497-498; so Hess 2002,78.

some Christian canonical writers were undoubtedly in touch with these developments.[34] However, the real connection of these *regulae* to the ecclesial canons – and certainly the implication that the former provided some type of model – is difficult to demonstrate. Ohme (and Hess) rely upon a very general point of formal similarity: both the canons of the late 4th C and these rules are very short and mostly indicative "summary" statements of regulation.[35]

However, the differences between the canons and these rules stand out much more than these very general similarities.

First, while there is a brief spurt of short indicative canonical regulation in the late 4th C, this is never a particularly typical form for canonical regulations; it is something of a passing "phase".[36] If this development must be attributed to the influence of the secular *regulae*, it is at the very least a very short-lived phenomenon. The canons in fact tend to become longer and longer as time goes on; and even very early they can easily tend towards the garrulous.[37]

More telling is the difference in the content and nature of the secular *regula* and ecclesial canons – almost entirely ignored by Ohme and Hess. Most of the *regulae* are maxim-like principles and definitions of a technical jurisprudence. For example, D. 50.17.3: "The power of refusal belongs to someone who is in a position to be willing"; D. 50.17.9 "In matters that are obscure we always adopt the least difficult view."; D.50.17.196 "Some dispensations relate to things, some to persons, and so those which relate to things are transmitted to the heir; those which relate to person are not transmitted to the heir". This type of regulation is clearly part of a much larger technical legal-doctrinal superstructure – a technical rule-logic discourse.

But this type of language and content, either as cited from the secular literature or as the result of a proprietary ecclesial jurisprudential discourse, is extremely, indeed conspicuously, rare in the canons.[38] To suggest that the type of summarization evident in the secular *regulae* is akin to that in even the briefest canons is thus a very misleading comparison. The canons represent "summaries" of the church rule-world inasmuch as any type of legislation represents "summaries" of general social experience or

[34] On the secular *regulae* generally, Schulz 1943,173-183, 295-296, 307-308; Stein 1966 (109-123 on the late classical period); Wenger 1942,53-61.
[35] Ohme 1998,497; Hess 2002,69-89, as part of his "statute" form.
[36] The best examples are the canons of Gangra, Laodicea, the Apostolic canons and some of the shorter penitential regulations of Basil (e.g. 55-80).
[37] For example, much of Nicaea and Antioch; even the brief Apostolic canons are filled with decorative asides. See below section E.
[38] See below section D.1

value/moral beliefs: they are mostly non-technical brief statements of rules of a huge variety of types. The *regulae*, conversely, are a very technical type of doctrinal jurisprudential summary. They thus have no very few true parallels in either the short 4th C rules, or almost any other type of eastern canon, before or after. The emergence of real ecclesial *regulae* – very explicitly on the model of *Digest* 50.17 – can only be identified as a coherent phenomenon in the 13th C west.[39]

In the end, then, neither in form or content do the canons look much like the secular *regulae*. At most, perhaps, the secular jurisprudential use of the term κανόνες may have been a contributing factor in the adoption of this language – but if so, only alongside many other usages of κανών.

Ohme's research into the church's broader ethical/philosophical discourse of κανών provides a better, if less specific, context for the persistence of κανών terminology. In Greco-Roman philosophy, as Oppel has shown, the term κανών clearly has a general ethical and epistemological sense as a measure of the good or good behavior, or as a fundamental philosophical criterion of truth.[40] It is not difficult to see how these meanings could easily shade into more concrete meanings of the term as epistemological, stylistic, grammatical, or even moral, behavioural and legal rules or models – and indeed, they did.[41] Likewise, in the Christian usage, as Ohme demonstrates, the well-known and well-established "canon of truth" language correspondingly encompassed and synthesized not only a broad dogmatic hypothesis of the faith, a creedal sense, but also moral and church-order normativity.[42] Further, in church usage this more synthetic sense could also fade into a plural, specific sense. Thus already in Origin, we read of τοῖς κανόσι τοῖς ἐκκλησιαστικοῖς ἑπόμενος – κανόνες here clearly used in a disciplinary sense for specific rules.[43] In the earliest canonical material itself it is likewise clear that, although not yet referring to concrete synodal enactments, κανών does refer to fairly specific traditional rules of a variety of

[39] Naz 1965; Stein 1999,46-51.
[40] Oppel 1937,23-39, 51-57, 87-94.
[41] Oppel 1937,34-35, 52-53, 64-66, 101-105 A good example of the first are Philo's "canons" for allegorical interpretation (see Oppel 1937,64-66).
[42] Ohme 1998,61-239 et passim.
[43] Origen *In 1 Cor.Hom.*, frag. 4, discussed and cited in Ohme 1998,194-195; further references at 217 n. 156.

types.[44] The term is thus clearly used for, as Hess puts it, "universally observed ecclesiastical standards" broadly of Apostolic origin and character.[45]

Ohme thus demonstrates a continuity of normative meaning for κανών from its broadest synthetic doctrinal-regulative sense (κανὼν τῆς ἀληθείας) through to its later more specific senses of traditional specific disciplinary rules. The latter naturally follow from the former, as both encompass the idea of transmitting traditional Apostolic norms. However, inexplicably, when concrete synodal enactments begin to be termed κανόνες (and particularly when these enactments are placed in the mouths of the Apostles in the Apostolic canons), Ohme feels that a major change has taken place, as the proper distinction between Apostolic norms and later church decisions has been destroyed: and thus this older and acceptable continuity between κανών and κανόνες is ruptured.[46]

It is, however, possible to read his results in almost the opposite way: the church begins to call its conciliar legislation κανόνες precisely as a terminological method for asserting the *continuity* of all legitimate church normativity with apostolic normativity – a continuity broadly asserted in the very shape of the tradition and the introductory material. In effect, the κανόνες are simply stating or realizing ὁ κανών, and thus the terminological similarity. Calling church rules κανόνες – and thus glossing the rules with all of the rich resonances of ὁ κανών in the older usage – is thus an argument that such rules *are* and should be considered "universally observed ecclesiastical standards", and that they are entirely coherent with the apostolic tradition. The term is thus being selected not because of any loss of distinction between apostolic ordinances and later church ordinances, but because it is inconceivable that any legitimate church ordinances would not also be apostolic. *The* κανών, the traditional semi-written κανόνες and the synodal κανόνες are all being asserted as part of the same continuous reality – and thus the preferment of κανών.[47]

Another well-known suggestion, that of Schwartz, is that the early use of κανών for a penitential tariff – reflecting the quantitative sense of the term underlying its employment for taxes or table of values[48] – may have, in the context of the pressing

[44] For example, in Nicaea 2 or 6, or Gangra (Epilogue) -- and here we might also count all of the early uses of the term for a penitential tarrif or ruling in, for example, Peter or Basil (Ohme 1998,296-312, 543-569).
[45] Hess 2002,77.
[46] See Ohme 1998, esp. 379-407, 485-509, 510-542, 570-582.
[47] See Taylor 1980,43-57 for a similar argument in terms of unwritten/written rules.
[48] On this "table" usage, Oppel 1937,66-68; on the tax, Wenger 1942,24-47 (although the "tax" usage is Roman legal documents is attested only from the 4th C).

problem of *lapsi* in the 3rd and early 4th C, provided a critical stimulus for the increased use, and ultimate dominance, of the term in the following post-Constantinian envrionment.[49] This is entirely possible, but, as Ohme points out, the tariff usage of the term κανών is rather less extensive than one might expect in the early penitential literature, and, in any case, early on the term ὅρος is more prominent than κανών for early synodal decisions.[50] Further, we might add, many early and later canons do not have a particularly penitential focus, or even indicate a tariff – the connection between these more general administrative rules and the early quantitative use of the term κανών thus becomes tenuous. Ohme is thus perhaps not wrong to suggest that this "tariff" use of κανών thus has little more to do with the later general usage than the use of κανών for a table of Easter dates or for the registry of clergy.[51]

The search for one or two principal semantic stimuli for the church's adoption of κανών has thus yet to reach a satisfying conclusion. It is worth considering, however, if such a narrow search may itself be misguided. Blastares' presentation of κανών, the only Byzantine treatment of the topic, although very late, is instructive in this regard. His discussion stresses precisely the plurality of usages: he understands the word as fundamentally derived from the use of physical straight-edge by builders, but he knows that it is used metaphorically (τροπικῶς) by the fathers for their "ordinances" (διατάγματα), as it is also used by "many different sages" (ἐπιστήμονες) of the "logical arts" (λογικαὶ τέχναι), including grammarians, philosophers, doctors, those who "reconcile the harmonies of the parts" (musicians), and, "indeed, what is more", by those who have gathered (or perhaps "composed", συντάσσω) the civil laws. All of them, he notes, use the term to separate and define, so that nothing incorrect or "base" (νόθος) intrudes itself. But the term is used most suitably of all for the διατάγματα of the fathers because of their particular goal (σκόπος), namely correct faith and the conduct of a God-loving life.[52]

In all of this, Blastares perhaps puts his finger on the single most important – and most certain – semantic characteristic of κανών: its polyvalence. The term κανών is notable precisely for the extraordinary number of regulative meanings and connotations it could encompass: physical rulers, grammatical rules, musical rules, artistic and stylistic models, various types of mathematial tables and lists, types of taxes and tariffs,

[49] Schwartz, 1936a,177 *et passim*; Schwartz points mainly to the uses of κανών in this sense in Basil (cf. 1911,316-333). See other examples in n. 7.
[50] Ohme 1998,11-14; 582.
[51] Ohme 1998,582.
[52] *RP* 6.5-6.

philosophical principles and technical jurisprudential *regulae*. As such, it is a term that can potentially link to, and be glossed by, many different types of rule-realm associations. Although it does undoubtedly become a fairly technical designation for church regulation, it is not an inherently technical or narrow term.

In light of this polyvalence, it is worth considering whether the whole question or "problem" of why κανών emerges as the rule term for church legislation has been overstated. We may just as likely ask why would it *not* have been chosen. If one were to seek a term for church regulations, and for whatever reason a "strong" secular-legal term were not desirable, and a more general term were needed, κανών is a reasonably obvious choice; in fact, there are not that many other options.[53] Here it may be wise to consider the extent to which by the Christian period κανών can be read as simply the normal Greek substantive for "rule", with something approaching the elasticity – if not perhaps quite the banality – of the modern English term.[54] The foreignness that attaches to the borrowed term "canon" in Latin and in most modern European languages has perhaps unduly oriented our research to thinking of this term as somehow exotic, and in need of special explanation.

2. Naming the law? The missing concept of "canon law"

Scholarship's concern to identify the precise meaning and significance of κανών can easily distract from what may be a much more important observation: the Byzantine tradition, and especially the central corpus of texts, almost entirely lacks an abstract notion of "canon law" or "church law". When terms such as ὁ κανονικὸς/ἐκκλησιαστικὸς νόμος or τὸ κανονικὸν/ἐκκλησιαστικὸν δίκαιον appear, they almost invariably refer to individual, concrete laws, customs, or legal rights.[55] The more general senses attached to these terms in modern usage, referring to the physical body or collection of the canons as a whole or "canon law" as a subject, field, or set of problems, or as a jurisprudential project, are almost entirely absent. To refer to the endeavour of canon law as a whole, or in any type of general way, the overwhelming tendency in the canonical literature is to resort some sort of *plural* concrete designator: "the canons", "the ecclesial ordinances", and so forth. This is the usage found in the prefaces, in the titles to collections, in manuscript rubrics, and the commentaries. If the singular *ius*,

[53] Cf. Woodhouse 1932,725. The other major possibility is ὅρος – a term which is also encountered in the earlier church legislation, but falls out of favour. The reasons for this are not entirely clear. See Appendix C (1).
[54] As in modern Greek.
[55] E.g. Nicaea 13, or Chalcedon 12.

lex, ὁ νόμος, and τὸ δίκαιον can take on modern-like abstract legal senses in other contexts, including the secular Roman law, and certainly in Scripture (ὁ νόμος τοῦ θεοῦ), this does not ever seem to have transferred to the canonical realm.[56] There is no "canon law".

The more abstract usage of "canon law", *ius canonicum,* seems to appear first in the west, and only in the 12th C, with the rise of canon law as a distinct field of study in the medieval universities, and very much on the pattern of the newly-rediscovered Roman law.[57]

The significance of this point of usage is potentially immense, but has rarely been noticed or dwelt upon – even though the anthropological literature has long noted this phenomenon: "primitive" laws tend to have "laws", not "law".[58] But this observation accords well with the general shape of the tradition. As noted in chapter one, Byzantine canon law exists primarily as a distinct body of "the canons", not as a distinct and abstract field of "canon law": it is composed of a very conservative and stable set of traditional rule-texts and it lacks a sophisticated or elaborate jurisprudence or even a significant proprietary academic or professional infrastructure. Even in the later Byzantine period, the entire system will develop more as a huge exegetical meditation around "the canons" – as a comparatively concrete and specific body of texts – than as a constructive jurisprudential project implied by "canon law". By not referring to itself with an abstract term "law", the tradition is quite accurately reflecting its substance.

B. Genre

By the standards of modern legal codifications, the most prominent genre characteristic of the Byzantine corpus is its heterogeneity. Although from a very broad perspective the corpus may be read as mono-generic – i.e. simply a collection of enumerated lists of rules either prohibiting or prescribing some type of behaviour or action – the underlying

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[56] It is interesting that classical Greek legal thinking also does not exactly have a term corresponding to *ius*; τὸ δίκαιον is always an awkward translation. Triantaphyllopoulos 1985,3. For secular *ius* in more abstract senses, see for example *Digest* 1.1-5, *Institutes* 1.1; for ὁ νόμος, Dio Chrysostom Περὶ νόμου (Oration 75; ed. von Arnim 1893). The phrase *lex Christiana*, encountered in the secular legislation – and not used in the Greek canonical tradition itself, as far as I am aware – seems to mean something more synthetic, along the lines of "Christian practice" or "way of life"; on this difficult expression, see Humfress 2007,196-201; Pieler 1987.

[57] Walter 1840,1; cf. Gaudemet 1958,478. On the general development of 12th C canonical *ius*, Brundage 1995, Ghellinck 1948, Kuttner 1982, Sohm 1923, Southern 1995/2005.

[58] For example, Diamond 1950,27; Donovan 2007,114 (attributed to Gluckman without references); Willetts 1967,35 (citing Diamond).

media of these rules varies considerably. Five genres may be identified: the conciliar pronouncement or record, the letter, the oration/treatise, the question and answer (ἐρωταπόκρισις), and poetry. Although some, even most, sources of the first genre were likely produced as enumerated lists of rules, many of the others clearly underwent later processes of division, extraction, and/or compilation to produce their later enumerated forms. Sometimes these works still exist in un-enumerated forms, and in many cases, even in the councils, variant enumeration schemes exist for the same source, pointing towards gradual and variable process of corpus enumeration.[59]

A detailed description of the genres present in the corpus may be found in Appendix C (3), but two very general observations about canonical genre may be made directly.

First, the corpus' handling of genre evinces a central instinct: the gathering and transmission of traditional rule-texts *in their integrity*. A phenomenon already remarked in chapter one, sources tend to enter the corpus in their original form, with most of their original apparatus, and this form tends to be preserved. Sustained, invasive processes of abbreviation, homogenization, and the extraction of "pure" rule content from the sources – processes we might understand as standard in modern codification projects, and evident in the ancient secular codes – are very hard to demonstrate. The most intrusive ongoing editing one can detect is the division of all sources into numbered canons and perhaps some occasional "trimming" of conciliar subscription lists or addressee sections.[60] More significant changes that may be detected, or suspected, seem to have occurred before, or perhaps at, the source's first introduction to the corpus. Thus Carthage is clearly a highly edited compilation of numerous earlier extracted sources; Laodicea may be an abbreviation and compilation of earlier, longer texts;[61] and numerous patristic texts obviously represent only the answers to questions now lost.[62] But there is no evidence that much editing took place after a source was included in the canonical manuscripts. From the moment these sources definitively enter the corpus the rule seems to have been ossification/preservation. The basic pattern or formula of "codification" is agglutination and juxtaposition of traditional texts in their traditional form – and the result a kaleidoscopic array of heterogeneous semi-sacred, ossified sources.

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[59] See Appendix C (2) for examples.
[60] On this see chapter 2, n. 98; Appendix B (2).
[61] On the structure and composition of Laodicea, see the overview in *Sources* Laodicea; also L'Huillier 1976,59-60
[62] E.g. Theophilus, Basil

Second, the genres employed suggest both dissonance and resonance with the late Roman civil legal tradition. The resonance is to be found in the simple preponderance of the letter form for legislation. Late antique and Byzantine secular legislation is increasingly (and by modern standards, surprisingly) epistolary.[63] The basic form of a general law (and even many more specific command-texts) is overwhelmingly a dated missive sent to a high official, or sometimes a group of addressees.[64] Vestiges of this letter-form are even preserved in the abbreviated redactions of the *constitutiones* found in the codices, where the addressees and dates are almost always retained. Canonical legislation is likewise surprisingly permeated, if not quite to the same degree, by letters: not only the majority of patristic material but a number of councils are framed as letters, or by letters, or as parts of letters (especially Gangra, Antioch, Constantinople, and Ephesus). Curiously enough, in late antiquity and Byzantium, law, secular or ecclesial, tends to emerge in letters.

The dissonances are more striking. Despite the general preponderance of the letter, the absence of any true *leges*-type law-writing in the corpus is very conspicuous (and under-appreciated in the literature). Virtually no source in the corpus is written in clear imitation of a proper late Roman novel: i.e. as a self-standing letter on a fairly unitary topic and, above all, with a clear structures of *protocol* (certainly with *inscriptio,* i.e. addressee, and perhaps *invocatio*), *prooimion*, *narratio*, *dispositio*, *sanctio,* and *eschatocol* (including subscription and dating, and publication instructions).[65] Individual canons may contain *prooimion*, *narratio*, *dispositio, sanctio* structures; indeed, in the second wave, these structures can become quite pronounced, and may well reflect a certain assimilation to imperial law-writing form.[66] Even some conciliar sources as wholes, such as Antioch, Constantinople, or Trullo, with their addressees, and (originally) subscription lists, might be vaguely thought of as novel-like. The letters of Gennadios and Tarasius are even closer: they are self-standing letters written on a specific topic, with a specific addressee, and under one name. But in all cases they lack, in particular, of the fairly stereotyped imperial protocols (with at least a generic

[63] Millar 2006,7-35 in particular emphasizes this.
[64] As many edicts do in fact possess addressees (albeit general ones – e.g. *CJ* 1.2.1; 1.23.4), and can be understood to gradually blur with imperial law-letters (e.g. Corcoran 198-203), it is safe, with Millar, to generally assimilate them to the "letter", at least for our purposes (and more so with the later pragmatic sanctions). For an overview of late antique and Byzantine legislative forms, see Dölger and Karayannopulos 1968, Pieler 1978 (*passim* but esp. 351-361), 1997a; cf. also van der Wal 1981.
[65] See above all Dölger and Karayannopulos 1968 (whence the terminology here), with summary at 48-49, also 77; also Pieler 1978,355-361; 1997a571-573. (For some criticism of Dölger and Karayannopulos 1968, Bochove 1997,159-160).
[66] Much of II Nicaea and Protodeutera read as such.

adressee) and eschatochols (at least with a date), strongly distinguishes the canonical law-writing from the secular, even as the latter are found in their abbreviated forms in the codices. Further, even the longest canons with *prooimion*, *narratio*, *dispositio, sanctio* structures only faintly recall the detail and extent of these structures typical of imperial novels. Some of the most common secular dispositives are also rare.[67]

This dissonance is especially glaring because ecclesial law-writing that is much more obviously imitative of the secular novels *is* known in late antiquity and later: the papal decretals.[68] Further, post-9th C Byzantine canonical legislation, in which synodical letters dominate, approximates the secular material much more closely. The canons as a whole thus emerge as a surprisingly different type of legislative form.

Indeed, it is curious that canons as a whole, particularly the conciliar legislation, and despite many resonances, do not look much like *any* type of contemporary legislative texts.[69] Broad resonances with parliamentary records and procedures (senatorial and perhaps provincial) have frequently been remarked, and there may be more parallels to be made with municipal codes.[70] If one allows comparison with historical texts (the Twelve Tables, in any reconstruction, the Penateuchal material, or other extant ancient codes), further points of identity can be made.[71] Nevertheless – although the point is perhaps a bit fine – compared with the products of the only other major source of *living,* active, public written normativity in most of our period, the emperor, the canons as a whole, and particularly the conciliar canons, are a fairly proprietary legislative phenomenon. (Their origin in collective authorities also distinguishes them quite dramatically.) The two public, empire-wide legislative *Rechtsmassen* of the late antique and Byzantine worlds thus do in fact look quite different. They are not radically "other" from each other, certainly, but clear and direct patterns of mirroring are not evident.

It is also worth noting that, on the level of genre and textual type, the only other major type of legal literature with currency in late antiquity and Byzantium, jurisprudential writings, also find little real parallel in the canons. A comparison

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[67] See below section C.
[68] See Jasper 2001,11-22; briefly Gaudemet 1958,222-226. On the general modelling of papal authority on imperial administrative patterns, see Humfress 2007,211-212 with further references.
[69] Of course the closest material in genre, tone and style to the canons is the apostolic church order materials; but these are "internal" texts of the Christian tradition, not our subject here.
[70] Hess 2002,24-27, 69-75 surveys the recent literature on the senate and/or municipal councils as models for Christian conciliar procedure and publication, with a summary of procedure at 27. See also Dvornik 1966,640-641, Harries 1998. Here we do not count the secular *regula* as a properly "legislative" form – and, as noted, the canons don't look much like them anyway.
[71] Or the longer edicts; see Johnston et al. 1961.

between the patristic canons and the works of Roman jurisprudents is often made, [72] but it is applicable only in a very general sense: the patristic letters are "responding" to questions or clarifying or communicating certain rules; they are written by individuals; Timothy's ἀποκρίσεις represent a genre known to be in use among the jurisprudents; the patristic material tends to be treated as secondary to and interpretative of the canons; the patristic material is occasionally apt to sound as if it is expressing opinion than issuing true authoritative judgments. However, real genre imitation and sustained textual similarities are very few. The patristic writings do not form themselves as "books" of any type like the Roman jurisprudential works listed in the Florentine index (e.g. βιβλία *digeston*, ὅρων, *iuris civilion*, *regularion*, ἐγχειριδίου, *actionon*, *ad leges*), none emerge as formal commentaries on an established corpus structure such as the Edict or the Sabinian corpus, and none are written with anything approaching the sustained, closed, technical and well-defined conceptual textures for which the *Digest* is well known.[73] Only one patristic source – Basil – reads with any consistency anything like this literature: some of his canons are written in a quasi-commentary style, stating a known rule and then subjecting the rule to various processes of quasi-technical rule-reasoning.[74] Other instances of such technical or doctrinal semi-commentary, directed towards points of law, may occasionally be found.[75] But in all cases, even in Basil, such discourse is fairly desultory, *ad hoc* and hardly beyond a level of technical sophistication expected of any well-educated rhetor. This type of writing is also not much more characteristic of the patristic material than the conciliar.[76] Further, none of the authors explicitly, or even allusively, cast their work as comparable to the secular σόφοι τοῦ νόμου (the normal Greek term for the Roman jurists);[77] their works are more those of quasi-magistrates than quasi-assessors. Broadly, in the Byzantine canonical tradition, the first candidates for proper jurisprudential-type literature are the 12th C commentaries.

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[72] This is very widespread; for example, *Fonti* 2.xiii; Hess 2002,87; *Peges* 63-64; Schwartz 1936a,178-179.

[73] Schulz 1953 remains an excellent overview of the types and textures of this material. Pringsheim 1921 usefully dissects many techniques.

[74] For examples, see below section D.1

[75] Certainly parts of Gregory of Nyssa, Theophilus and Cyril.

[76] Commentary-like texts or technical-interpretative activity may be found, for example, in Trullo or Protodeutera – or even Nicaea. See section D.1.

[77] The *Coll14* τὰ μὲν σώματα might be read as suggesting it, *RP* 1.6, but it is not particularly strong, especially considering that the secular σόφοι are mentioned later in the prologue – a comparison would have been easy. See van der Wal and Stolte 1994,xvii on the term σόφος for "jurist"/*prudens*.

Contrary to the common formulation, then, the conciliar canons do not look much like imperial laws, and the patristic material does not look much like jurisprudential literature. Such a comparison finds a real referent (perhaps) only in the post-12th C western canonical structure of papal decretals (= imperial *leges*) and the commentaries of the decretalists (= jurists).[78]

C. Normativity I: the canons as rules. Structure and dispositive vocabulary

The basic structural features of the individual canons *as rules* invite investigation for two reasons: first, to determine the basic character of the rules, particularly their level of abstraction and categorical force; second, to determine their relationship with other types of normativity.

We may define the basic structural features of the canons as rules as 1) their overall syntactical and compositional structures (e.g. "if...then..." case structure or straight apodictic prohibition "Let not....", or formal compositional divisions such as *narratio, dispositio, sanctio*), and 2) key dispositive, or normative, vocabulary employed (e.g. δεῖ, προστάσσομεν, κελεύομεν).

A survey of both these features reveals that the Byzantine tradition is (again) characterized above all by heterogeneity. This is true across the corpus as a whole, which we might expect, but also *within* individual sources. There are only two sources which show almost complete consistency in both form and vocabulary of rule expression: Gangra, which enunciates each of its short rules according to the strict schema "Εἴ τις + optative (sometimes indicative, but optative variant readings may often be found)...ἀνάθεμα ἔστω; and Protodeutera, which uses the dispositive formula "ἡ ἁγία σύνοδος... ὥρισεν...", or the similar ἡμεῖς...διοριζόμεθα or simply ὁρίζομεν[79] in every canon but one (9),[80] to convey the canon's central rule content and/or punishment. In a few other sources, large stretches of texts are often very similar, sometimes as vestiges of earlier processes of compilation, but the consistency of expression in these parts of the sources ultimately only serves to highlight the discontinuity of form in the whole of the sources in their more mature or final forms.[81] Broadly speaking,

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[78] See generally Brundage 1995,59-61, 154-174.
[79] Canons 11, 12, 17.
[80] Where it is suitably replaced with ἡμεῖς οὕτω συμψηφιζόμεθα, as canon 9 is merely repeating and strengthening Apostolic 27.
[81] See especially Laodicea 1-19 and 20-59, as well as Constantinople 1-4, and, to a lesser degree, Basil 56-74 and Carthage 35-47 and 66-85.

harmonization and uniformity of rule-structures is simply not a priority in the Byzantine corpus.

Most texts in fact cycle through a variety of structures and dispositives, even if one or two may often be particularly common. Nicaea, for example (considering just primary rules, or where this is unclear, the first rule; if supplementary rules are counted, the diversity is greater), has εἴ + imperative constructions in canon 1 and 8; ἔι + indicative in 9; ἐπειδή + ἔδοξεν in 2 and 20; ἐπειδή + imperative in 7 and 12; ἐπειδή + δικαιόω in 17; ; ἦλθεν εἰς τὴν...σύνοδον + imperative in 18; ἀπαγορεύω μήτε + infinitive in 3; προσήκει + infinitive in 4; χρή + infinitive in 16; περί + imperative in 5; περί + ἔδοξε in 8, 11, 14 (partially in 5); περί + indicative in 13, 19; διά + ἔδοξε in 15; straight imperative in 6, 12; straight indicative in 10.

Turning to syntactical and compositional structures alone, the forms evident in the canons are numerous. Nevertheless, like much ancient legislation, the canons are overwhelmingly casuistic. That is, the majority of canons can be understood to contain (and in this order) a functional protasis, in which a problem, behaviour or circumstance is stated, and an apodosis which states the consequence of or determination for this problem, often including or constituting a sanction, although this last may follow as a third element. The classic form of this type of rule is an explicit "if...then" statement – e.g. "If anyone should pray with an excommunicated person, even in a house, let him be excommunicated"(Apostolic 10). But many variants are possible. A common type, easily converted to an if...then statement, is a nominative or accusative participial subject structure ("He who..."), such as Ancyra 19 "Those who having professed virginity disregard their profession, let hem fulfill the penance of digamists" (Ὅσοι παρθενίαν ἐπαγγειλάμενοι ἀθετοῦσι τὴν ἐπαγγελίαν τὸν τῶν διγάμων ὅρον ἐκπληρούτωσαν). Also very common are ἐπειδή or περί + circumstance clauses,[82] or casuistic *narrationes* as simple statements.[83] The basic formula of these rules, whatever their exact form, is "if in x situation, then y". This corresponds to a simple *narratio-dispositio* structure.

Not all canons are casuistic. Some – at least in their primary rule – are straight apodictic authorizations or prohibitions. For example, Apostolic 1 "Let a bishop be

[82] For example, Trullo 6 Ἐπειδὴ καὶ παρὰ τοῖς ἀποστολικοῖς κανόσιν ηὕρηται τῶν εἰς κλῆρον προαγομένων ἀγάμων μόνους ἀναγνώστας καὶ ψάλτας γαμεῖν, καὶ ἡμεῖς... ὁρίζομεν...; or Chalcedon 5 Περὶ τῶν μεταβαινόντων ἀπὸ πόλεως εἰς πόλιν ἐπισκόπων ἢ κληρικῶν ἔδοξε...

[83] For example, Protodeutera 7 Πολλὰς τῶν ἐπισκοπῶν ὁρῶμεν καταπιπτούσας, καὶ ἀφανισμῷ τελείῳ κινδυνευούσας παραδίδοσθαι, ὅτιπερ οἱ τούτων προεστηκότες τῆν περὶ αὐτῶν φροντίδα καὶ ἐπιμέλειαν εἰς νεουργίας μοναστηρίων καταναλίσκουσι· καὶ ταύτας διασπῶντες, καὶ τὸν σφετερισμὸν τῶν εἰσόδων ἐκμηχανώμενοι, τὴν ἐκείνων ἐπαύξησιν πραγματεύονται. Ὥρισεν οὖν...

ordained by two or three bishops". Many of these apodictic regulations, as essentially isolated dispositive phrases, do not specify sanctions. Those that do often must add a supplementary sanction in "if...then..." form, and may be viewed as semi-casuistic. For example, Apostolic 5: "A bishop or presbyter or deacon is not to cast out his wife on the pretext of piety; if he does cast her out, let him be suspended; persisting, let him be deposed."

Such non-casuistic rules may be found throughout the corpus, but by far the greatest concentration of these type of rules are to be found in Laodicea, and to a lesser extent Antioch (e.g. 1, 2, 7, 8, 9, 13, 19-25). They are clearly a subordinate type of regulation.[84]

The preponderance of casuistic rules in the corpus is important for understanding the nature of canonical normativity. It above all reveals a tendency – yet again – to think in terms of specifics and the concrete. In this respect, it is very much like most other ancient laws.[85] The law presents itself not so much as concerned with juristic abstraction or general principles as with the preserving and presenting of sets of traditional answers to specific problems. As such, the system does not center on comprehensive generalities, abstractions, or principles built through hypotheticals and deductive reasoning. Rather, the system is built from the bottom up: from the amassing of many concrete details from which, through induction, analogies and abstractions might be derived. But the system is not exactly "built" at all – and it is not really much of a "system" either. Expansion is mostly about the gradual and relatively unprogrammatic *accumulation* of every greater quantities of specific regulations. Further processes of induction and abstraction are perhaps assumed, but not particularly a focus of the literature itself. The "law" is primarily the "laws".

It is important to note, however, that while the majority of the canons are formally casuistic, these same canons are very rarely *substantively* casuistic – i.e. they rarely contain explicit narration of specific cases. Despite a number of important exceptions, the canons are not as a whole a collection of real case dossiers or records of

[84] Despite the impression given by Ohme 1998 and Hess 2002, who seem to present this type of legislation as an evolutionary end-point of the church's "legalization".

[85] On this aspect of ancient near-eastern law, and ancient law generally, see Westbrook 1988,88-102 (although the contrast with later Roman and Greek law is exaggerated), 2008. On Roman law's oft-remarked lack of interest in abstraction and deductive system-building, Berman 1983,121-141; Frier 1985,158-170; Gaudemet 1986; Glenn 2007,127-128; Schulz 1936,41-65; Stolte 2003,85; Weber 1954,215-216, 276-277; and especially Hezser 1998,586-595, 629-631, where the observation of Roman "Gelegenheitsgesetzgebung" is also extended to Talmudic writing, with many further references. See also Tuori 2004 on the exaggeration of the extent and sophistication of early Roman "legal science".

decisions in specific cases.[86] Most canons are written as generic rules in casuistic form. In this sense, the system tends to fairly high level of generalization in terms of potential rule-application – the "specificity" of the system is more formal than substantive.

It is also important to note that this casuistic orientation of the system – the seemingly *ad hoc* nature of the regulations – does not imply a lower level of categorical force, or a lowered expectation for general applicability (as if the rules are merely local statements of examples, or "suggestions", or "guidelines"). Roman law, Mosaic law and indeed most pre-modern laws are built around the conglomeration of specific, casuistic rules – Byzantine canon law is no less categorical in intention or force than any of these.

Dispositive vocabulary and mood in the canons – i.e. the phrases used in the dispositive acts of ordering and legislating (e.g. we order, let x happen), and their grammatical mood (indicative, infinitive, imperative) – are also chiefly marked by variety and irregularity. Real consistency is the exception, within or across the sources. The only lengthy sources in which at least some elements of the dispositive vocabulary are almost entirely regular, aside from Gangra and Protodeutera, are Antioch (almost entirely "legal infinitives") and Laodicea (mostly δεῖ statements).

Most sources instead move through a variety of terms and grammatical forms. These include third person imperatives or equivalents (i.e. third person subjunctive aorists), as Apostles 23 Κληρικὸς ἑαυτὸν ἀκρωτηριάσας καθαιρείσθω; second person imperatives or equivalent (very rarely), as Basil 28, ...ὥστε καταξίωσον διδάσκειν αὐτους τῶν ἀπαιδεύτων προσευχῶν καὶ ἐπαγγελιῶν ἀπέχεσθαι; command or "legal" infinitives, in which the infinitive has no explicit governing auxiliary, as Apostles 35 Ἐπίσκοπον μὴ τολμᾶν ἔξω τῶν ἑαυτοῦ ὅρων χειροτονίας ποιεῖσθαι...;[87] plain indicative statements of rules or practices, as Constantinople 7 τοὺς προστιθεμένους τῇ ὀρθοδοξίᾳ...ἀπὸ αἱρετικῶν δεχόμεθα κατὰ τὴν ὑποτεταγμένην ἀκολουθίαν καὶ συνήθειαν; impersonal modal constructions, of which δεῖ and χρή (and variant χρεωστεῖ) phrases are the most frequent, but including also δίκαιόν ἐστιν, προσήκει, δύναται, ὀφείλει, ἔξεστι, ἀδεία ἐστίν, εὔλογόν ἐστιν, simple ἐστίν (in the sense of it is not right/possible) and a number of more complex phrases such as τὸ ἔθος καὶ τὸ πρέπον ἀπαιτεῖ... (Theophilus 1), ἔστω τύπος ὥστε... (Theophilus 7); and, finally, a

[86] Naturally most of the *acta* extracts attached to Constantinople, Ephesus and Chalcedon refer to specific problems or cases. Other notable conciliar exceptions, generally involving actual naming of individuals or very specific cases, or very close to it, include Ancyra 25, Constantinople 4 and 5, all of Ephesus, Serdica 18 and 19, and a number of Carthaginian canons, most notably the framing Apiarian dossier. In the patristic material, most of Gregory Thaum., Theophilus, Cyril, and many of Basil's supplementary letters (after canon 85) read as specific cases; most of the rest, the majority, do not.

[87] On these infinitives, especially prominent in Antioch, see Smyth 1956,448.

large number of "meta-dispositives", i.e. indicative statements in which the legislators voice their own agency in the legislative process through statements such as "**we** decree", "**we** decide", "it seems good to **us**".

These last are collectively the most common, productive and varied form of rule-expression in the corpus. They are dominated by terms that connote deciding, decreeing, judging, or "judging good", such as ὁρίζω (the single most common term throughout corpus, very frequent from Chalcedon onwards[88]), δικαιόω (e.g. Nicaea 17; Ephesus 3,4, 5, 9; Chalcedon 1), δοκέω (usually in third-person form ἔδοξε, also very frequent[89]), or ἀρέσκω (regularly in Carthage and Sardica as translation for *placere* forms; also Athanasius to Rufinus). Other examples of this group be found in Appendix C (4). Closely related are "ordering" or "commanding" terms, such as προστάττω (e.g. Apostles 27, 41, 46; Ancyra 17, 21; Basil 34; Trullo 21, 63, 65, 73, 97, 100) and κελεύω (e.g. Apostles 15, 26; Ancyra 23, 25; Antioch 36; Constantinople 6; Ephesus 3; Basil 1, 24, 34, 51; Sardica 14, 18; Protodeutera 5), as well as permission and forbidding language such as ἐπιτρέπω (Apostolic 82, II Nicaea 14), ἀπαγορεύω (Nicaea 3, Trullo 51), or ἄδειαν δίδωμι (Protodeutera 6). Other meta-dispositive expressions are confirmatory in character, including ἀνανέομαι (Trullo 3, 8, 25, 36, 49; II Nicaea 6, 7) κρατύνω (Trullo 1, II Nicaea 1), ἐπισφραγίζω (Trullo 1, 2), κυρόω and ἐπικυρόω (Trullo 1, 2; Protodeutera. 11), συνευδοκέω (Trullo 43) συμψηφίζομαι (Protodeutera 9, 11), and συμφωνέω (Protodeutera 11). In a number of sources, especially earlier patristic material, a number of "measuring" or "tariff" meta-dispositives are common. These are used specifically to indicate the length of particular penances, and include ὁρίζω (e.g. Basil 4, Gregory Nyss. 4), οἰκονομέω (Basil 62, 72; Gregory Nyss. 1; Theophilus 2), κανονίζω (Basil 77), συμμετρέω (Gregory Nyssa 2), and once even δοκιμάζω in this sense (Gregory Nyssa 5). Similar are a number of "punishment" verbs including καθυβάλλω (e.g.Trullo 79), ἐπιτιμάω (e.g. Trullo 67, Theophilus 2), κινδυνεύω περὶ τὸν βαθμόν (Chalcedon 2, 22), or ἀναθεματίζω (Trullo 81).

[88] I.e. Chalcedon 3, 6, 7, 10,11, 12, 14, 16, 19, 20, 23, 27; Trullo 3, 6, 7, 17, 29, 30, 31, 36, 42, 45, 49, 53, 54, 56, 61, 62, 72, 79, 82, 84, 85(διορίζω), 86, 92, 94, 99; 2 Nicaea 2, 4, 7, 8 20; all Protodeutera; Hagia Sophia 1, 2. Earlier, it may be found in Apostles 74 (in sense of measuring or apportioning out a tariff), Nicaea 6; Ancyra 21 (tariff usage); Serdica 7, 8, 11, 12, 15; Antioch 18; Laodicaea 1; Constantinople Prosphonetikos; Ephesus 6, 7, 9; Basil 4 (for past decisions), 27 (tariff usage), 88; Theophilus 12 (for synod); and not infrequently in Carthage, esp. after 50 (usually translating *statut-*/*constitut-* forms).
[89] E.g. Nicaea 2, 14, 15; Ancyra 1-4, 6, 7, 11, 12, 14; Antioch 10, 20; Ephesus 8; Chalcedon 25, 26; Trullo 2, 3, 12, 55, 60; Gregory Thaum. 2; Athanasius to Rufinianus; Basil 1; Gennadius.

Although individual sources may evince a higher concentration of one type of dispositive form than another,[90] only one broad pattern in the corpus may be discerned: the general councils are much more given to statements of rules with meta-assertions of the legislator's action than the other sources. There are exceptions. Ancyra, for example, contains numerous examples of meta-dispositives – although they are almost all ἔδοξεν, which might be regarded as an archaic form, as it rarely occurs in the second wave.[91] Both the early western sources, too, often as part of their dialogical structures, contain large number of meta-expressions. It must also be noted that Antioch, Gangra do not contain meta-dispositives within their canons *per se*, but the canons are framed in the corpus by introductory structures that serve much the same function. Conversely, Trullo contains numerous imperatives.[92]

Nevertheless, on a canon-by-canon basis, the pattern is fairly clear: the Apostolic canons, most of the Antiochian corpus, and much of the patristic legislation (esp. Basil) are dominated by simple imperatives, impersonal modals, and statements of rules, while the ecumenical councils prefer meta-dispositives. We may consider this pattern a quasi-chronological development, as much of the first group of material is written in the 4th C, and much of the second in the 5th C or later, although Nicaea and Constantinople are exceptions. This development is made all the more striking by the fact that it is accompanied by a gradual but unmistakable privileging of one particular meta-dispositive: ὁρίζω (and variants). Already very prominent in Chalcedon, ὁρίζω dispositive phrases will emerge as virtually *the* formula for canonical legislation, far more frequent then any other single term in the second wave. This development is also part of yet another, larger development, namely the general movement away from indirect dispositives (ἔδοξε, ἤρεσεν), especially common in the 4th C sources and the western material, to direct dispositives, usually in the first person plural or the third person singular (with subject "the holy synod" or similar).

This predilection for meta-dispositives, and especially first-person ones, may represent an assimilation to formal imperial law writing. Imperial novels are almost always written with such meta-dispositives, and the solemnity of imperial conciliar legislation could call for precisely this type of imitation. Many of the later canons with

[90] Aside from those already mentioned, the Apostles and Theophilus have a very large number of imperatives; Ancyra favours ἔδοξε and imperative constructions; the western sources tend to privilege ἀρέσκει clauses; Nicaea and Athanasius to Rufinianus contains a large number of ἔδοξε constructions; δικαιόω is especially prominent in Ephesus 1-6; straight indicative statements are common in Basil; and Timothy is dominated by ὀφείλω.
[91] The exceptions are Trullo 3, 12, 55 and 60.
[92] For example, 5, 11, 13, 14, 15, 20, 21, 24, 27, 35, 40, 46, 47, 48, 52, 58, 59, 69, 70, 72, 83, 88, 98.

these dispositives will also contain more prominent *prooimion-narratio-dispositio-sanctio* structures, which also heightens this similarity.[93] At the very least these shifts witness to the gradual regularization – and formalization – of the legislative task.

In terms of the selection of dispositives, a broad lexical continuity with Greco-Roman legislative language may be observed. The lack of systematic studies of secular dispositive terminology makes definite and precise conclusions impossible, but vocabulary of, for example, ἀπαγορεύω, ἔδοξε, ἔξεστι, δικαιόω, κελεύω, προστάσσω, ὁρίζω (διορίζω, προσδιορίζω), ψηφίζομαι, and of course δεῖ and χρή are easily found in the Justinianic and Leonine novels.[94] Many of the simpler imperatival or indicative statement forms also find easy resonance in the secular codices and synopses, as well as in the Biblical laws and moral tracts.[95]

One or two points of dissonance nevertheless exist. Most interestingly, two of the "strongest" secular legislative verbs are surprisingly rare in the corpus. The most conspicuous absence is θεσπίζω, probably the most common legislative term in the Justinianic material, and not uncommon in Leo.[96] It can be found in the corpus only four times.[97] The similarly strong legislative term νομοθετέω (and variants), although not especially common in the secular material, also has only a very secondary presence in the canonical literature, occurring only six times.[98] Curiously, all but three of the instances of both words place these verbs in the mouths of past legislators, i.e. they are not real dispositive assertions by the source at hand.[99] It seems that the strongest

[93] Trullo 79, II Nicaea 7 and Protodeutera 10 are particularly "full" examples of this form, but such structures, especially without the prooimion, can be discerned in most of the lengthier second wave canons.
[94] For Justinian, see the *vocabularia* of Archi and Colombo 1986 and Mayr 1923 (and both Justinian and Leo's Novels are searchable on the *TLG*). See also the brief comments of Dölger 1968,75.
[95] Aside from the Codices, so in the *Ecloga*, the *Prochiron;* or, in Scripture, Exodus 20-23 and Deuteronomy 12-26 (where future statements and second-person imperatives or equivalents are particularly dominant).
[96] It may be regarded as virtually the standard Justinianic meta-dispositive, occurring approximately 300 times in the Novels, often in the formula θεσπίζομεν τοίνυν... It is also common in Leo, occurring 45 times. See Archi and Colombo 1986,1334-1349 and Mayr 1923,199-200.
[97] Serdica 11; Trullo 1, 8; and Hagia Sophia 3
[98] Basil 18, 88 Trullo 12, 26, 36, Protodeutera 1
[99] The exceptions are Basil 88, Trullo 1, and Hagia Sophia 3. Even Basil 88 is in a sentence which is emphasizing that Basil was not the first to legislate on his particular topic: οὔτε πρῶτοι οὔτε μόνοι, ὦ Γρηγόριε, ἐνομοθετήσαμεν γυναῖκας ἀνδράσι μὴ συνοικεῖν. In Trullo 1 θεσπίζω is found in the rather rare circumstance of asserting a doctrinal confirmation, which may explain its unusual presence; it may also be present here merely as *variatio*, as Trullo 1 conspicuously, and rather elegantly, cycles through a number of different dispositives: ὁρίζω, ἐπισφραγίξω, ἐπικυρόω, etc.

legislative terms are only put into the mouths of previous legislators. A third term, κελεύω, is also more prominent in the secular material than the ecclesial.[100]

Conversely, ὁρίζω vocabulary, used as a general dispositive, is hardly present in Justinian at all. It is more evident in the 9th C Leo, but it is possible that as a regular dispositive term it represents something of a semi-technical "church" term; alternatively, it may simply represent a general later-Byzantine preference.[101]

Broadly, however, there is little truly exceptional about the shape of the dispositive vocabulary and forms of the canonical literature: the canons are mostly writing rules within the normal parameters of Greco-Roman legal rule-writing.[102] The general avoidance of a number of "strong" imperial dispositives, particularly θεσπίζω, may be read as simply one more example of the canons' delicate and indirect negotiation of identity with the civil legislation: the two broadly exist in the same realm or rule-language and form, with many resonances, but also with certain subtle patterns of distinction.

Taken as a whole, the normative shape of canonical rules, both in structure and dispositive diction, suggests two basic observations.

First, the canons yet again emerge as above a heterogeneous collection of specific rule-traditions. A strong concern for formal uniformity or rationalization is not evident, either in composition or compilation (although such a concern is *occasionally* evident). Indeed, despite a certain gradual standardization in form and diction, a distinct lack of concern for formal regularity is everywhere evident. The casuistic nature of the canons heightens this emphasis on the concrete and particular. This is not law conceived as a neat rational construct, a gapless system of regular and coherent norms: it is a sprawling collection of authoritative pronouncements, in many different forms, made in many different contexts. This does not make this law any less categorical or forceful (or "legal") – it simply anchors legal authority in an engagement with the specific and concrete.

Second, the canons do not emerge, either in their rule-forms or dispositive vocabulary, as radically unique or unusual. Their broad casuistic form of rule-presentation is coherent with much ancient law, and their dispositive diction does not

[100] Over 200 examples of formal first-person forms may be found in Justinian's Novels, and 20 in Leo's. See Archi and Colombo 1986,1512-1517 and Mayr 231. The canonical evidence – the examples above are almost exhaustive – are much sparser, and include *all* forms of the root.
[101] For Justinian, see Archi and Colombo 1986,2390-2939; Mayr 1923,329 From the *TLG*, twenty six instances of dispositive statements with ὁρίζομεν may be found in Leo's novels.
[102] cf. Pieler 1991,606, 616-117 on the secular-like language of Zonaras in paraphrasing the dispositions of the canons.

seem to be wildly out of line with Greco-Roman traditions. Only one or two differences of emphasis in the selection and use of dispositives suggest some subtle literary differentiation with contemporary secular legal literature.

D. Normativity II: the legal language of the canons

The central methodological imperative of this work is to allow the canonical literature to define its own sense of "legality". Nevertheless, a critical – if often unstated – question of the modern literature is the degree to which the canons contain linguistic and conceptual phenomena that today, at least, would be considered characteristically "legal". To what extent do the canons read as "legal" texts? Can we discern a specifically "legal discourse" in these texts?

From the standpoint of the formalist-positivist legal culture sketched in the introduction, "legal discourse" tends to mean "technical legal discourse", which in turn means patterns of concepts and language that function as the specialized logical grammar of a closed and clearly defined body of formal rules (operated by trained professionals). This discourse manifests itself in particular in the use of specialized and proprietary vocabulary and style; a strong interest in terminological, conceptual and definitional precision and consistency (and thus the heavy use of formulaic phrases); a tendency to schematize and proceed methodically through different aspects of a problem, perhaps addressing even hypothetical problems; a strong concern for rule-detail and comprehensiveness of regulation, including concern for exceptions and a tendency towards rule "prophylacticism" in which rules attempt to foresee and forestall false interpretations, and make multiple, slightly different provisions for various types of circumstances; and finally, a concern to constantly speak within and to "the rules" – i.e. to refer to other rules often.[103]

In the canons, almost all aspects of this type of technical legal discourse may be detected. It may emerge merely in the passing citation of a noticeable phrase or term from secular technical legal discourse, or it may manifest as a stylistic tendency, or it may appear as a much more sustained technical legal structuring of the canonical material itself. It occasionally even suggests that the system is beginning to operate as an autonomous parallel and proprietary legal discourse: i.e. with its *own* concepts,

[103] The inspriration for these characteristics may be found in the references in the Introduction, n. 59; also, Mellinkoff 1963.

terminology, and rule "grammar", as distinct from other Greco-Roman technical legal discourses

1. The legal parts

The single most prominent locus of technical-legal discourse in the corpus is the canonical penal system.[104] Quite aside from the fact that the stipulation of clear, specific sanctions itself may be understood by some as a defining characteristic of legal discourse itself (versus other types of social and moral rules),[105] these provisions in many sources evince a formulaic quality that strongly suggests the legal. This is particularly noticeable in sources such as the Apostolic canons (esp. 42-44, 51-72), Gangra, Trullo, or Protodeutera, where the repetition of penal formulas can be quite prominent (e.g. "ἢ παυσάσθω ἢ καθαιρείσθω", "ἐὰν [one condition or subject] ἀφοριζέσθω, ἐὰν [another condition or subject] καθαιρείσθω"; "εἰ...ἀνάθεμα ἔστω". Curiously, it is perhaps most prominent in the oldest penitential punishments (e.g. much of Basil's letter 217, Ancyra 1-9, most of Gregory of Nyssa) which evince a strong sense of technicality in their precisely defined and quite technical penitential steps (e.g. mourners, hearers, supplicators, "standers"), and their interest in developing a detailed system of specific tariffs (one year excommunication, three years, etc.).

A legal-like standardization of substantive penalities may also be noted. Despite much variation in both substantive content and terminology across the corpus as a whole, three provisions in particular may be distilled as a standard set of penalties: excommunication (for laity) or suspension (for clerics), usually called ἀφορισμός;[106] deposition for clergy, generally καθαίρεσις;[107] and a stronger and rarer punishment of ostracism or permanent public damnation, more varied in content and terminology, but often conveyed with ἀνάθεμα, ἀπορίπτω, ἀποκηρύττω or ἀποβάλλω language.[108] In addition one will also occasionally hear of general, unspecified, ἐπίτιμια.[109] In the first wave these three (or four) categories are already particularly obvious and standardized in the Apostles (e.g. 42-45, 62) and the *Coll14* 9.10-18, where they are schematized. By

[104] On Byzantine canonical penal law, see especially Panagiotakos 1962 and Rhalles 1907. For the older graded penitential system, Schwartz 1911.
[105] See Donovan 2007,3-15, Freeman 2001,207-219.
[106] Also often some type of paraphrase with ἀκοινώνητος, e.g. Chalcedon 8 ἔστωσαν ακοινώνητοι. See Panagiotakos 1962,295-296, 334-335.
[107] Related, if not always identical, with the punishment of being in danger of losing one's βαθμός, rank e.g. Chalcedon 2 τοῦ οἰκείου ἐπιπτέτω βαθμοῦ. See Pangiotakos 1962,4.264-270 for common paraphrases and further examples.
[108] See Panagiotakos 1962,321-323.
[109] E.g. Chalcedon 3, 8, 14, 24; II Nicaea 16; Protodeutera 6

the second wave they are omnipresent, if not exclusive, and the three of them emerge twice in short-hand expressions for canonical penalties generally, first in II Nicaea 1, which professes faithfulness to traditional provisions ἀνάθεμα, καθαίρεσις, and ἀφορισμός (it also speaks of other types of ἐπιτίμια), and Hagia Sophia 1, which confirms the reciprocal observation of Roman and Constantinopolitan canonical measures in terms of the same three categories. Although many other different types of penalties will often be specified (loss of rank, loss of honour)[110] the relatively regular presence of these three defined and distinct concepts strongly suggests a technical, methodical conceptualization of sanctions.

These provisions also constitute one of the very few clear and consistent examples of proprietary internal technical concepts or terms in the corpus. Although the ideas of suspension, demotion and ostracism are certainly not unknown in antiquity, the collection of these terms as a regular technical *set* of penal provisions, and for the most part the terms themselves, seems without obvious and regular parallel in the Greco-Roman legal world; certainly the contemporary imperial legislation does not regularly express sanctions in this way. In a sense, the Byzantines were themselves aware of this, inasmuch as they can speak about the distinction between secular and church law as lying precisely in the different character of its sanctions.[111] It has its own penal *system*.

Penal provisions aside, technical-legal discourse may be found throughout the corpus in a variety of different forms. It may be sought in 1) terminology; 2) stylistic tendencies; 3) legal "turns of thought"; 4) legal concepts, definitions and principles; 5) sustained or subtle examples of rule logic.

Technical-legal terminology is perhaps the most obvious and easily discerned type of technical legal discourse in the canons. In principle, it may include technical Greco-Roman secular law terminology, technical terms from Scriptural law, or any signs of proprietary Christian technical terminology, traditional or novel. In practice, it is mostly evident in borrowings from Roman legal and administrative language; certainly these present the most dramatic examples.

Among the most obvious and prevalent of these last include a large number of adoptions of substantive Greco-Roman institutions, offices or legal instruments. Among the most prominent include office or position language such as ἀξίωμα, τιμή or

[110] See Panagiotakos 1962,4.264-340, Rhalles 1907,43-134.
[111] Especially obvious in οἱ τοῦ μεγάλου θεοῦ; see chapter 2.A.3.

ὀφφίκιον;[112] terms for legislation or documents such as νόμος, διαταγή, διάταξις, or λίβελλος;[113] the names of specific offices such as ἔκδικος (*defensor*);[114] administrative and legal institutions such as ἐγγύαι (securities),[115] ἐνέχυρα (pledges),[116] λόγοι (in the sense of financial accounts, *rationes*) and εὔθυναι (reports of administration),[117] and basic legal procedures such as the διάγνωσις (the standard translation of *cognitio*)[118] or more general "hearings", ἐξέτασις or ἀκρόασις[119]. These borrowings or modeling have often been remarked, and all clearly evince the general receptivity of ecclesial administration to secular Roman forms.[120]

More intriguingly, and more directly germane to our concerns, are the subtler weavings of Roman legal phraseology and processes into the articulation of the rules themselves. Procedural subjects are a particularly fertile area for this type of borrowing.[121] Some of the language is quite general, common to both native Greek legal usage and Roman law texts, and hardly remarkable, including charge words like ἔγκλημα/ἐγκαλέω[122] or αἰτία/αἰτιάομαι[123] (both general Greek legal terms for charges or accusations, the former also a formal translation of *crimen*), ὑπόθεσις (case),[124] δίκη (penalty, punishmanet), ἀπολογία/ἀπολογέω (defense),[125] κατηγορία/κατηγορέω (accusation),[126] ἐλέγχω and διελέγχω (convict and prove)[127], ἀποδίδωμι (hand over);[128] ἀποκατάστασις (restoration or reversal),[129] φωράω (always in passive, to be caught in a

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[112] Common; for example Apostles 29; Nicaea 7, 8; Antioch 5; Serdica 20; Chalcedon 2, 4; Trullo 7; Hagia Sophia 2.
[113] For λίβελλος, Ephesus 8, Cyril 3; see the table in section A above for others.
[114] Carthage 75, 97; Chalcedon 23.
[115] Chalcedon 30.
[116] Tarasius *Fonti* 2.326-327.
[117] Antioch 25, Basil 20.
[118] Serdica 14; Trullo 39; Protodeutera 13, 14 (συνοδικὴ διάγνωσις).
[119] E.g. Serdica 3, Cyril 1 (a κανονική ἀκρόασις), Theophilus 6 (ἀκριβοῦς ἐξετάσεως γινομένης).
[120] On Christianity's appropriation of Roman governance and legal forms, see Gaudemet 1958,322-30, 378-407; Herrmann, 1980, 23-92, 207-231, 290-306; Hunt 1998,240-250; Humfress 2007,196-211; Jones 1964,874-894; Millar 2006,133-140.
[121] It has often been remarked that the most obvious Roman law borrowings in church law are in this area; e.g. Humfress 2007,208-209.
[122] Very frequent; e.g. Apostles 28 (where they are to be φανερά); Antioch 14, 15; Constantinople 6 (including in the more technical form ἐκκλησιαστκὸν ἔγκλημα); Ephesus 9; Chalcedon 18 (directly appropriating the secular Roman condemnation of the crime of conspiracy, τὸ τῆς συνωμοσίας ἢ φρατρίας ἔγκλημα); Peter 12 (in the slightly more technical phrase ἔγκλημα προσάγειν), 13, 15; Basil 9 (τὸ γὰρ ἔγκλημα ἐνταῦθα τῆς ἀπολυσάσης τὸν ἄνδρα ἅπτεται), 21 (ὑπάγειν ἐγκλήματι), 24, 33, 37, 41, 53; Theophilus 3, 6, 9; Trullo 21 (ἐγκλήμασι κανονικοῖς), 98; Protodeutera 10, 13, 14.
[123] E.g. Laodicea 40, Cyril 1, Constantinople 6.
[124] Chalcedon 9.
[125] E.g. Antioch 4, 6, 12; Serdica 4, 13, 21.
[126] E.g. Constantinople 6 (esp. ἐκκλησιαστκὴ κατηγορία), Basil 61.
[127] E.g. Neocaeasrea 8, 9 (and here "φανερῶς"); Basil 61; Gregory Thaum. 8, 9; Protdeutera 9; the latter, Cyril 1.
[128] E.g. Gregory Thaum 8, 9.
[129] Apostolic Epilogue; Antioch 13; Protodeutera 3.

crime),[130] ἐκκαλέω/ἔκκλησις (appeal),[131]; εὔθυνος/ἀνεύθυνος and ἔνοχος or ὑπεύθυνος (guilty/innocent and liable)[132]. The concentration or repetition of some of these terms can nevertheless create a highly technical-legal impression.[133]

Other terms are more clearly "legalese", or at least distinctly administration-speak. A good example is πρόκρινω, as in Nicaea 10: τοῦτο οὐ προκρίνει τῷ κανόνι τῷ ἐκκλησιαστικῷ. This is a calque of the Latin *praeiudicare*, which denotes in legal texts any type of "prejudice", that is, impairment of, or harm or attribution of liability to someone or something, including very often, as here, "harm" to the validity or applicability of some rule.[134] It is quite common in concilar *acta* and may be found several times throughout the corpus.[135]

Closely related are a number of technical parliamentary turns of phrase. Thus we encounter διαλαλέω/διαλαλιά, an extremely common Greek parliamentary-legal calque of the Roman law *interlocutio*, i.e. an "interlocutory judgment".[136] Formal decisions, judgments or rulings are of course often rendered with ἀποφαίνω/ἀπόφασις or γνώμη, both standard forms for *sententia*.[137] Constantinople 394, a parliamentary extract, is full of such language, including as well a rare technical use of ἐμφανίζω (*insinuare*)[138]; the same texts also begins with a curiously formal (and technical?) statement of Nectarius "seeing" before him the two bishops in disagreement.

Other borrowings are not directly related to procedure or parliamentary process. Among the most prominent and common is δίκαιον/δίκαια, in the sense of legal rights/*iura*. Thus, for example, in Ephesus 8, each province is to preserve its "inherent rights" (τὰ αὐτῇ προσόντα δίκαια); likewise in Chalcedon 12 there is a concern that

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[130] Very frequent; e.g. Apostles 54, 73; Ephesus 7; Basil 68, 70; Gennadius (*Fonti* 1.2.296); Trullo 12, 20, 33, 50, 53, 77, 79, 88; II Nicaea 10, 18; Protodeutera 4, 6, 7.
[131] E.g. Serdica 3, 5; Carthage 28, 125.
[132] Basil 42, Cyril 1, Theophilus 6 (ἐγλκήματι πορνείας ὑπεύθυνος), Chalcedon 29, Trullo 21.
[133] So, for example, the repetition of ἀπολογία and ἀποκατάστασις as a kind of legal formula in Antioch 4 and 12; or of ἐὰν μὲν κατηγορηθέντες ἐλεγχθῶσι...ἐὰν δὲ ἑαυτοῖς ἐξείπωσι καὶ ἀποδῶσι in Gregory Thaum. 8, 9; or of ἐλεγχθῆναι φανερῶς in Neoceasrea 8, 9; or of εἰ μόνον ἐλεγχθείη in Protodeutera 14, 15. Areas of high levels of concentrated procedural terminology include Constantinople 6, Cyril 1, and much of Theophilus.
[134] Berger 1953,644; cf. Avotins 1992,181.
[135] Nicaea 10; Carthage Acta 1 (*Fonti* 1.2.205); Theophilus 3, 5; Constantinople 394; Trullo 37; Protodeutera 7.
[136] Constantinople 394; Ephesus 7; Gennadius (*Fonti* 1.2.297). Avotins 1992,58; Berger 1953,512-513.
[137] E.g. Nicaea 5; Antioch 6, 14, 15; Serdica 4, 5, 14, 19, 20; Cyril 1; Theophilus 4; Gennadius (*Fonti* 1.2.298).
[138] I.e. *insinuare apud acta*, that is, "enter into the public acts", here in its somewhat broader sense of "formally exhibit/demonstrate before a court". See Avotins 1989,53-54; 1992,79-80; also under "ἐμφάνισις".

metropolitans preserve their οἰκεῖα δίκαια during imperial divisions of the jurisdictions; in Trullo 37 various ἐκκλησιαστικὰ δίκαια are to be unharmed.[139]

Further examples of late Roman legalese may be found in Appendix C (5).

Proprietary technical terminology is much more difficult to identify, aside from the penal provisions noted above. The term κανών itself, as a regular term for an ecclesial rule, is among the best candidates. The technical cast of the term is conveyed especially strongly by the various adverbial and adjectival uses of the root: κανονικῶς or κανονικός.[140] The canons constitute a sufficiently specialized and autonomous rule discourse to speak "canonically". Another example may be the usage, twice, in Trullo 41 and 46, in a monastic context, of the phrase μεθ' εὐλογίας, with what seems to be a proprietary technical meaning of "with permission" (a usage retained in the Orthodox church today).

Aside from these, the only proprietary Christian terminology in the corpus relates to specific institutions, the best candidate for which is probably the concept of a σύνοδος τελεία, which in its repetition in Antioch 16, 17 and 18 sound like a technical concept.

More difficult to pinpoint than technical legal terminology is technical legal style or tone.

One of its more obvious incarnations is perhaps the terse and economic prose found in some of the first-wave legislation, peremptory in tone and almost staccato in rhythm. This stylization conveys a strong sense of the canonical rules' force, comprehensivity, and generality. This style is particularly prominent in much of the Apostles, most of Gangra and Laodicea, much of Basil's third letter to Amphilochius (217), and Theophilus's ὑπομήστικον. In the last, the highly administrative prose is economic and dense to the point of obscurity.

Other stylistic tropes also convey a sense of authority, precision and rule-comprehensivity. One of the most distinctive is what we may term "legal pleonasm". This involves the rapid successive restating of certain concepts in which the sense is shifted slightly, either through the use of different aspects or forms of an action (to condemn any common possible variant) or different tenses. This type of writing is quite common in the secular *leges*. It is never overwhelming in the canons, but does emerge occasionally. Thus, for example, in Ephesus 7 "no one is permitted **bring forward** or

[139] Other examples may be found in Constantinople 394, Ephesus 8, Trullo 39.
[140] E.g. Ephesus 9; Cyril 1; Trullo 21, 33; cf. Wenger 1942,119-125.

compose or **construct** another faith..."; in Constantinople 4 "...Maximus did not **become** and **is** not a bishop....and everything that that has beendone **concerning him** and **by him** [τῶν **περὶ αὐτὸν** καὶ τῶν **παρ' αὐτου**] is declared invalid."; in Chalcedon 17 "...and if a city **has been erected** or aftewards **will be erected** by imperial authority....". Sometimes, with pairs of near-synonyms, it is difficult to tell if one is encountering mere (and typical) Byzantine hendiadys, or if a real conceptual distinction is intended.[141]

Other typically "legal" stylistic tropes include the repetition of formulae, the use of "aforesaid" phrases, or the use of officious-sounding hyperbole. See Appendix C (6) for examples.

Overlapping with legal stylizations are what we may term "legal turns of thought". These are conceptual tendencies or patterns which convey a sense of legal technicality.

The simplest and most obvious of such patterns is the tendency to write with frequent reference to other, usually older rules.[142] Although not always strikingly "legal" if examined in isolated examples, the cumulative effect of repeated rule-referencing strongly conveys the idea that one is writing with a closed system of formal norms. Rule referencing may be found throughout the corpus – as the table in section A indicates – but is especially strong and noticeable in Gennadios, Basil, and virtually all of the second wave, where canons can be entirely given over to conveying or interpreting older rules.[143]

A much broader and multi-faceted conceptual phenomenon is the pattern of speaking and thinking in exceptional detail, with attention to precision and the striving for comprehensiveness. In effect, the texts read as if the rule-world is struggling to encompass as much of reality as possible and as carefully as possible. Its most obvious manifestation are rules or questions which evince almost pedantic attention to very narrow issues or provisions. Ancyra 14's concern to stipulate a very specific minimal rule requirement is a good example of the former type: fasters must at least *taste* meat, and then they may abstain (to prove they are not reviling meat-eating per se). Similarly, Timothy 8 addresses the very specific problem of whether a woman at the verge of childbirth must fast during Holy Week (no); Timothy 13 is concerned with a minimal

[141] See the instances of this type of stylization in Ephesus 1, 2, 3, 5, 9; Chalcedon 4, 27; Hagia Sophia 2; and Protodeutera 1, 5, 6, and 13.
[142] See generally the table in section A, above; also below, section E.1.
[143] For examples of this last, see Basil 1, 3, 8, 9, 12, 24, 47, 50, 51, 80; Trullo 6, 8, 14, 16, 36, 90 (among many others; see *Historike* 294-295); II Nicaea 5, 6, 11; Protodeutera 8, 9; Tarasios is essentially a canonical florilegium on simony.

requirement for sexual abstinence (couples must abstain from intercourse at least Saturday and Sunday); Basil 37 rules that a man who has married again after his first marriage to another man's wife will be punished for adultery for the first marriage – but not for the second; Theophilus 5 turns on whether the deacon Panuph married his niece before or after baptism.

A particularly noticeable subset of this type of technical rule-detail work may be found in the frequent positing of exceptions to broader rules, often as asides. For example, Apostles 54 forbids clerics from eating in taverns, unless they must stay at an inn while on a journey. Laodicea 1 permits digamy, but only if there is no clandestine marriage. Chalcedon forbids clerics from engaging in business affairs, but lists two exceptions: guardianship of minors or ecclesiastical adminstration. Protodeutera 5 is quick to insert two specific exceptions to its three-year novitiate rule: those who are sick or who are already living a monastic-like life. Many other instances of such provisos may be found.[144]

Another subset of this type of thinking emerges when considerable pains are taken to work through a variety of different, detailed aspects of the same general rule or problem, either within one canon, or across a series of canons. This tendency leaves the impression of very careful, almost finicky, concern for comprehensiveness and thoroughness, and often suggests an agonistic rule environment. Many of the instances of legal pleonasm above may be counted here, but a good general example is Gangra 7 which is careful to specify as problematic both the taking *or* giving of offerings against the will of the bishop *or* anyone entrusted with these things. Ephesus 2 makes separate mention of both bishops who never condemned Nestorius, as well as those who did condemn him but then back-slided. Ephesus 4 specifies that both private and public adherence to Nestorianism is forbidden. II Nicaea 10 is careful to stipulate that clerics may only come to Constantinople and serve in nobles' houses with the permission of *both* their bishop and the patriarch of Constantinople. For further examples, see Appendix C (7).

Even more revealing of a technical concern for detail – and conveying a strong sense of operating within a well-defined rule system – are the various instances when a later rule fills in, or corrects, small details or gaps is earlier legislation. Basil 24, for example, addresses a narrow rule-gap in Pauline legislation: if widows who marry are to be overlooked in the distributions, what about widowers? Timothy 5 is a response to a

[144] For example, in Basil 13; Ancyra 11; Antioch 11; Chalcedon 4, 25; Trullo 68; Protodeutera 4.

question on the details of Paul's rules about couples' mutual sexual abstentions (the night before liturgy?). Trullo contains a very large number of such examples. Canon 5 repeats prohibitions against clergy living with women (particularly Nicaea 3, but also Ancyra 19, Basil 88, and more vaguely Carthage 38), but now adds a clear punishment, and extends the rule to eunuchs as well. Canon 6 cites Apostolic 26, that only readers and singers may marry, and reaffirms it by stating that presbyters, deacons and subdeacons may *not* marry after ordination; the intention must be to counter attempts to assimilate subdeacons to the lesser clergy named in Apostolic 26. Canon 15 supplies a minimum age for ordination of subdeacons, which had been overlooked in the earlier legislation (which is summarized in canon 14). Further examples may be found in Appendix C (8)

These general conceptual-legal tendencies are sometimes accompanied by – or develop into – manifestations of what we today might consider real "legal scientific" discourse. These include the development of formal schematizations and categorizations, the regular use of formal distinctions, concepts, and definitions, and the employment of rule principles. All evince the strongly "jurisprudential" concern to explore or determine how rules can be applied systematically to a variety of fact situations.

Among the best examples of sustained technical schematization and categorization are the lapsi categorizations of Ancyra 1-9 and Peter. Both show a concern for the methodical drawing of careful distinctions and an interest in rational systematization in the (more or less) descending pattern from higher ranking to lower ranking and less problematic to more problematic.[145] Also important are the graded schemata of heretics, primarily in Basil 1, Constantinople 7, and Trullo 95, but also Nicaea 8 and 19, Laodicea 7 and 8 and Basil 54. The most extreme example is Gregory of Nyssa's division of penitential rules into the Platonic schema of the faculties of the soul.[146] A more localized example would be the careful distinctions on the age and status of perpetrators of bestiality in Ancyra 16. Although only Gregory of Nyssa engages in building a multi-layer branching set of divisions (sin is divided into three categories, each category is divided into further types of sins, and so on – a conceptual "pyramid" as Fuhrmann calls it)[147], these schemata all evince a concern for both rule-comprehensiveness, definition and careful distinction. The categorization of lapsi and

[145] Something similar may be found in Ephesus 1-6 and Protodeutera 13-15.
[146] These will be discussed more fully in chapter four.
[147] Fuhrman 1960; see further chapter 4.F.

heretics may also be considered one of the very few important proprietary legal-like distinctions of the canonical tradition.

Formal concepts, distinctions and definitions may also be found. Most may be regarded as commonplaces. Particularly striking is the very stock distinction between voluntary and involuntary actions.[148] Basil 8 explores the difference with reference to murder in great detail, considering a number of different possible scenarios. One may also find the distinctions of unwritten/written,[149] knowledge/ignorance,[150] or a crime confessed/un-confessed[151]. Many of these distinctions emerge in the context of determining a penitential tariff, as potential mitigating or exacerbating factors. Related are a number of formal concepts concerning the circumstances of an act, such as a person's "intention" or "disposition" (προαίρεσις, διάθεσις, πρόθεσις)[152], or "need" or "force" (ἀνάγκη, βία)[153]. Basil also speaks of custom having "the force of law"[154].

More specific distinction and definition-making may also be found. This is particularly obvious in Gregory of Nyssa where distinctions are explicitly named as διαιρέσεις and διαφοραί, and include extended discussion of the difference between adultery and fornication (canon 4) or stealing and robbery (canon 6). Elsewhere in the corpus other fairly specific distinctions can become important topics of discussion, including those between self-castration and non-self-castration,[155] formed and unformed fetuses,[156] different degrees of sexual contact,[157] or widows and virgins[158].

Some canons are specially focused on whether a certain case may be subsumed under a set definition. Basil 2, for example, treats the scope of application of the technical definition of murder: does it include abortion? (yes) Basil 31 deals with the problem of whether a woman whose husband has gone away and marries before assurance of his death is indeed an adulterer (yes). In a similar way, Protodeutera 9 mostly revolves around the meaning of the verb "to strike".

Very occasionally, principles and maxims – *regula*-like material – are voiced. The biblical prohibition of double jeopardy, for example, is employed in such a way

[148] Ancyra 22, 23; Gregory Nyss. 2, 5; Basil 8 (also called a διαφορά here).
[149] Basil 91, 92; II Nicaea 7.
[150] E.g. Basil 7, 27, 46; Trullo 79.
[151] Gregory of Nyss. 4, 6; Gregory Thaum. 8,9; Basil 61.
[152] Nicaea 12; Basil 8, 10, 11, 53; Gregory Nyss. 8; Neoceasarea 6, 12; Carthage 47 (although these last three are with specific reference to baptismal theology).
[153] E.g.Gregory Thaum. 1; Gregory Nyss. 3; Ancyra 3; Chalcedon 25; Trullo 41.
[154] Basil 87
[155] Nicaea 1; Protodeutera 8.
[156] Basil 2
[157] Basil 70
[158] Basil 18

three times.[159] Likewise Basil 40 should probably be read as appropriating a Roman legal principle when he notes that a slave who has married without her master's consent is a fornicator since "the contracts of those who are subject to another have no force".[160] Protodeutera 17 likewise contains a quite explicit citation of a Roman *regula*: τό γε σπάνιον οὐδαμοῦ νόμον τῆς ἐκκλησίας τιθέμενοι ["...not making the exception in any way the law of the church"]. This is a paraphrase of *Digest* 1.3.4 = *Basilica* 2.1.5.[161]

A few principles may be considered proprietary. Although highly theological in content, Basil's formulation in canon 27 that a presbyter who has sinned sexually cannot serve liturgically as "it is illogical for one to bless another who ought to heal his own sins" seems to have become accepted as a kind of canonical principle in Trullo, cited as such in canon 3.[162] In Basil 26 we also may not be wrong to hear a proprietary canonical principle in "Fornication is not marriage, nor the beginning of marriage".

Finally, to complete our survey, a number of places in the canons are notable for simply involving particularly subtle, ingenious, complex or sustained jurisprudential logic of one type or another – their "legal" texture is unmistakable. Frequently these combine many of the foregoing elements.

Some of the most impressive are those which contradict some overly-subtle rule-interpretation, or attempt to close loopholes. Protodeutera 9 for example is written to counter narrow rule-agonistic interpretation of an older canon: it confronts those who attempt to evade Apostolic canon 27 by ordering people struck, instead of striking them themselves. It disallows this distinction and – in a fairly technical way – directly isolates and addresses the problem of the definition of "strike" in the canons, opting for a simple comprehensive definition ("the canon chastens simply 'striking'"...). Similarly, II Nicaea 12, probably the most "legalistic" canon in its source, directly addresses a very narrow and technical and ingenious rule loophole: seculars may not acquire church property directly, *nor* through an intermediary clerical possessor. It also contains considerable secular-legal diction, and build its regulation around an older fixed rule (Apostolic 38).

Sometimes the ingenuity and subtlety is more on the canons' own part than any targeted interpretation. Trullo 13, for example, seems to read Carthage 3 and 25, on

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[159] Apostolic 25; Basil 3, 32. The principle is from Nahum 1.9. Basil 20 also cites ὅσα γὰρ ὁ νόμος λέγει, τοῖς ἐν τῷ νόμῳ λαλεῖ (Rom. 3:19) to void the professions of virginity of heretics.
[160] See Buckland 1963,419-420; Kaser 1955,1.314.
[161] Τοὺς νόμους ἀπὸ τῶν ὡς ἐπὶ τὸ πλεῖστον συμβαινόντων, οὐ μὴν τῶν σπανίως εἰσάγεσθαι δεῖ. The text in Protodeutera could, of course, be an exact citation of another paraphrase. See also Basil 87, 91 92; Constantinople 394; Protodeutera 7 for other possible examples of secular legal rules or concepts.
[162] And again in Trullo 26 as part of a fuller citation of Basil 27.

clerical continence, as properly only referring to sexual continence before the service of the liturgy – a distinction not entirely evident in the canons in question. Trullo 16, interpreting Neocaesarea 15, draws a fairly fine distinction between deacons who serve liturgically, and the deacons of Acts who were specially appointed to address the needs of the community.

Many of the most sustained instances of such reasoning may be found in Basil, whose work often reads as a virtual rule-commentary. Basil 1 is representative of many of Basil's techniques and concerns.[163] The canon is above all about finding specific rules about reception of different types of heretics: thus he begins by talking about customs that prevail, then noting that no canon on the Pepouzeni exists, then working through how a rule for them might be found, then noting different rules on the Cathari, and Encratites, and finally, most strikingly, worrying about how certain actions imply broader rule consequences for others (namely, that the acceptance of certain Encratite bishops implies acceptance of those in communion with them οἷον κανόνα τινα). In the course of all this, Basil makes a technical distinction between three types of heretics, defines each type, weighs different traditional rules – one of which, Cyprian's, he exposits in full, going step by step through its rather fine, multi-step logic – worries about objections and complications (e.g. what it means that the Encratites accept orthodox baptism), and offers his own reasoned opinions.

We thus have very many classical "jurisprudential" concerns, in considerable concentration and all very near the surface of conscious concern: rule finding and precedents, distinctions, definitions, systematic classification, problems with authority of rules, problems with setting precedents, and ways of harmonizing conflicting rules. Even one of the most important characteristics of real jurisprudential thought, the logical generation of new rules from old ones, i.e. making the rule system itself create rules, is present, if vaguely.

Another good Basilian example – and one of the greatest examples of technical rule discourse in the corpus – is Basil 87, the letter to Diodorus. Here Basil's explicit target is a very fine interpretation of the Mosaic law which justifies taking one's dead wife's sister in marriage on the grounds of Leviticus 18:18: "You will not take your wife's sister, to uncover her nakedness, to rival her, while your wife still lives". The argument was made that one could take one's wife's sister once one's wife was dead. Basil, extremely annoyed at this "σόφισμα", responds angrily that everyone should

[163] Other good "jurisprudential" examples include Basil 8, 9, 10, 18, 21, and 63.

know better than this, even without detailed reasoning, but that he will provide arguments "from reason" (ἐκ τῶν λογισμῶν) anyway. He then goes on to analyze, for example, how "syllogizing from logical inference from the silence of a law is to make one a lawgiver, and not to let the laws speak" (τὸ δὲ ἐκ τῆς τοῦ ἀκολούθου ἐπιφορᾶς τὸ σιωπηθὲν συλλογίζεσθαι νομοθετοῦντός ἐστιν, οὐ τὰ τοῦ νόμου λέγοντος), and produces several pages of similar logical and exegetical arguments showing the absurdity of such reasoning, and the likelihood of his own interpretation.

Further examples of similar extended "legal" discussions, from throughout the corpus, may be found in Appendix C (9).

2. The legal whole?

When the above instance of technical-legal language and thought are considered together, *en masse,* it becomes difficult to avoid a simple conclusion: technical legal discourse does exist in the canons. The canons are entirely capable of speaking and thinking in a manner consistent with modern expectations of a fairly closed, formalist and agonistic rule system. The large number of parallels, borrowings and cross-overs with secular Greco-Roman legal technical discourse also demonstrate that the canons can move very comfortably in the world of their contemporary secular jurisprudential culture: they can, and do, engage in the same type of "rule-think" as the Roman law.

This first-blush consonance with modern expectations – and even Roman law – is, however, deceptive. Despite the impression that may be given by amassing a number of technical legal characteristics in one place, as above, the corpus does not in fact read as a primarily or convincingly technical-legal text – certainly not by modern standards, and not even, I think, in comparison with the *Digest* or other contemporary Roman legal works (although here the difference may be more quantitative than qualitative). Two factors work against such a reading.

First, technical legal discourse is present only very unevenly in the corpus. Whereas modern technical discourse, virtually by definition, is programmatic, systematic, and above all *consistent*, this is not so in the canons. Technical legal stylizations and characteristics – formulas, technical diction, high levels of details, use of principles, arguments from definition, etc. – tend to fade in and out throughout the corpus. Some parts of the corpus are thus very legal sounding, such as Antioch, Basil, some of Carthage, Gangra, Protodeutera, and many of the *acta* extracts. Elsewhere sources evince hardly any technical-legal content at all – the two canonical poems of

Gregory Nazianzen and Amphilochius, and most of the very general letters of Dionysius and Gregory Thaumatourgos, are obvious examples. Most often sources are simply collections of straight rules, embellished in various ways, but with hardly enough technical legal stylization or content to distinguish them markedly from any other types of rules. Individual canons may thus be exceptionally "legal": for example, Protodeutera 9 on "striking" or the property-focused II Nicaea 12; or Basil 1 on heretic baptism. Others, not mentioned above, would include Constantinople 6, a huge meditation on procedure; or Constantinople 394, a technical discussion of the number of bishops needed to ordain and depose another bishop; or Chalcedon 28, a detailed canon, filled with legal stylizations. But such rules must be placed alongside the distinctly un-legal Carthaginian doctrinal canons (109-116), or the Basilian exegetical canons (15-16), or canons such as Neocaesarea's bizarre "canon" 4 ("If anyone, desiring a woman, intends to lie with her, but his desire does not come to fruition, it is evident that he has been saved by grace") or the homily-like regulations of Ephesus 9 or Trullo 96 – or simply the huge range of rules that are little more than simple statements and prohibitions. It is also noteworthy that certain topics tend to attract more technical-legal discourse than others. If one were to follow carefully the topics covered by many of the examples listed above, one would find that topics which are closely akin to matters treated in Roman law, secular or ecclesiastic, tend to attract the most technical attention: marriage, procedure, heretics, jurisdiction, finances, interactions with the secular administration.[164]

Even the sources that are more technically-inclined are rarely technical or "legal" in the same way. Gangra, for example, is precise, formulaic and detailed, but quite simple and clear; Theophilus is very dense and technical, an example of work-a-day administrative prose; Antioch is garrulous but officious and refers to a number of secular administrative institutions; Athanasius is rhetorically highly wrought but very methodical; Constantinople 6 is very dry, but Roman in content and diction, and highly comprehensive; Basil 1 or 87 are highly theological in content, but work through specific rule and classification problems in great detail; Protodeutera is often novel-like in its structures and legal stylizations, but quite ornate; and so on. All of these texts in some way feel distinctly "legalistic", but *consistent* patterns of technical rule writing are hard to identify. Even individual sources evince considerable variation. Trullo 3 or 16 show a certain degree of jurisprudential subtlety, but other rules, such as Trullo 96 are

[164] This is a point that merits further study.

virtually moral-rhetorical homilies, and most are little more than straight prohibition. And often it is difficult to determine if a source, while technical in some respect, is legally so: Athanasius' distinction of "canonical" books and books that can be "read" (κανονιζόμενα vs. ἀναγινωσκόμενα) in Athanasius 2 is perhaps a good example; but even Gregory of Nyssa's programme of *divisio* is not for the most part particularly "legal" in texture – it is medical, psychological, and philosophical, and fairly typical of elementary textbooks of many varieties.[165]

The second mitigating factor, and the more important one, is the huge quantity of not-so-technical discourse in the canons – discourse that suggests that the canons are not primarily meant to be read as a closed rule system in an agonistic environment, or as a systematic whole, or as an exercise in rule-logic. These "un-technical" characteristics take a variety of forms, and operate on a variety of levels, but even the more technical moments in the canons are often revealed upon closer inspection to be not quite so technical at all.

The penal system, for example, while showing considerable regularity relatively speaking, is in fact mostly notable – from a modern perspective, at least – for its variety of terminology, its lack of standardization, and its numerous gaps and ambiguities.[166] Thus the difference between ἀνάθεμα and ἀποκήρυξις, for example, is hardly obvious. Further, many canons simply don't specify punishments, or they are simply quite vague.[167]

Many more specific examples might be cited. Basil 87, for instance, the Letter to Diodore, is one of the most jurisprudential-sounding texts of the corpus, but closer suggests it turns more on simple moral outrage than real jurisprudential logic: its critical argument is that one should not be acting passionately. Likewise the rule against double-jeopardy may be articulated more than once, but contradictions are not difficult to find.[168] Gangra seems to evince many formulae and a concern for detail, but its overall structure is chaotic, and shows little rational progression or concern for logical topic coverage –five canons, for example, scattered throughout the source, touch on virtually the same topic.[169]

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[165] Fuhrmann 1960.
[166] See the references in nn. 106-108.
[167] Much of Laodicea and Serdica are example for the former; for the latter, see for example Chalcedon 3, 9, 14.
[168] E.g. Apostolic 29, Neocaesarea 1, Serdica 1.
[169] Abhorring marriage: 1, 4, 9, 10, 14.

Also glaring are the many small elements of the canonical texts that can best be described – by modern standards – as instances of "legal clumsiness". In these texts considerable ambiguity is created through unclear drafting, or rules are asserted that seem inappropriate, irrelevant or hopelessly vague for a system of logical rule application. For example, Apostolic 60 rules that pseudepigraphal books cannot be read publicly "as holy works" "to the harm of the people". Does this mean they could be read if not considered holy and/or not read to harm the people? In Laodicea 10 children are not to be married to heretics "indiscriminately" (ἀδιαφόρως); could they be married to heretics with care? Gangra 1 condemns any ascetic who "reviles" a married woman "as if she we not able to enter the kingdom [of heaven]". Does this mean that reviling with another type of ideological intention might be permitted? Antioch 19 notes that it is "better" that a full synod elect a bishop, but not necessary – why do we need to know what is "better"? The minimal rule should suffice. Neocaesarea 2 simply notes that penance for the spouse of a fraternal digamist will be "difficult"(!). In Basil 53 a widow slave has "perhaps" (?) not fallen too greatly if she gives herself over to an abduction marriage. Many other examples of this type might be cited. Clearly these texts are not meant to be read as precise technical rule-cogs in a smoothly-running formalist rule-machine.

Finally, many canons are full of material that would simply be considered "extraneous" from a modern technical-legal perspective: moral or theological asides, scriptural exhortations, rhetorical decoration, or small harangues. These elements can often submerge the more technical elements of rule articulation – and if read *as* part of technical rule articulation they can create considerable ambiguity. They are the topic of the next section.

The overall complexion of technical legal discourse in the canons is thus quite disconcerting, and particularly when the corpus is considered as a whole.[170] On the one hand, technical-legal handling of the rules is clearly possible, and can even appear in quite serious and sustained ways. It would be a mistake to suggest that this is a legal world that is unconcerned with comparatively narrow problems of rule interpretation and application, or logical consistency, or even the development and use of a technical "grammar" of terms, principles and definitions. This is a world that is capable of and values detailed "rule-think".

[170] And, note, we have for the most part not even been considering the many points of apparent contradiction within the substantive provisions of the law – on which see the references in the Introduction, nn. 3, 8.

On the other hand, this technical legal discourse is clearly not a primary or default mode of church-rule exposition; it is not the "controlling" discourse of the system. There is no sense that the system *as a whole* is trying particularly hard to constitute itself as a convincing technical legal mechanism, or that the canons are primarily being written for such a discourse. (Indeed, in this respect, this section has been arguing the obvious: even a quick reading of the canons will disabuse one of the notion that this material is written or edited to look anything close to the technical products of modern formalist legislators – and thus the reason modern Orthodox canonical manuals read very differently than the canons themselves!) Instead, technical legal discourse tends to appear occasionally, almost opportunistically, if sometimes dramatically. It is thus present, but it does not dominate, and it does not constitute fundamental framework of the system. As odd as it may seem, then, it is apparently only a *part* of a much broader, irregular, and variegated legal discourse – not an unimportant part, but only a part.

E. Normativity III: the non-legal legal language of the canons

The fact that technical-legal discourse is only a part of canonical discourse raises the question of what the other parts might be.

Functionally, the canonical texts may be understood to "do" a number of things. Their first and most obvious function is to convey rules, and in this function their technical-legal aspects become most evident. This has been the subject of the previous two sections. But in order to engage in the above analyses of the canons as rules, we have had to artificially distill their "pure" rule content from the canonical texts themselves as compositional wholes. In so doing, we have had to ignore much other "extraneous" matter that is present. This is a process that modern readers engage in almost unconsciously when examining such texts: ancient laws are read as a quarry from which legal rules and doctrine might be, with care, and often some frustration, extracted. In this it is very easy to overlook what else might be going on in these texts – and to ask why they seem to be so full of "extraneous" matter in the first place.

Recently, in Byzantine law studies, and elsewhere, a growing recognition has developed that laws can have not only a pragmatic rule-function but also a symbolic function.[171] This realization has emerged from the need to explain the function of rules

[171] In Byzantine law, see especially Fögen 1987; Haldon 1990,258-264; cf. Harries 1991,56-59 or also Nelson 2008,309 on early medieval western collections as "totemic and inspiration as well as practical".

that otherwise seem to contain completely obsolete or impossible provisions – like much of later Byzantine law, essentially recycled 6th C material. In this view, it is recognized that laws provide not only – and maybe not even primarily – a set of real-life rules, but an interpretative framework for a society's self-understanding, a template for a culture's identity and social functioning: they "enunciate a more or less consistent world view, a moral system...regardless of its practical relevance in day-to-day terms..."[172] Such laws still provide a kind of normativity and regulation, but it is much more geared towards internalizing broad narratives of social order and socio-cultural behaviorial expectations than developing and maintaining a workable rule-system.

In such a view, the presence of many "extraneous" ideological elements in the laws suddenly becomes less surprising, particularly if we extend this idea of the "symbolic" nature of law to accept that laws are not simply *used* in a symbolic way – a kind of subsidiary usage in moments of cultural decline – but are actually *written* and idealized in such a way. These extraneous elements, as in the prologues, are suddenly not so extraneous – they are not simply "rhetorischer Schmuck"[173]. They are instead speaking to other normative dimensions of the text, aside from the rule's straight rule-content, but not necessarily any less essential or unimportant. Indeed, in this case, it would be a mistake to consider these elements as extraneous to the nature of the texts as laws at all – a proper law *qua* law speaks "symbolically": it speaks to broader narratives of normativity. Incidentally, this is precisely how Plato says laws are supposed to be composed.[174]

In late antique and Byzantine law it is, I think, quite possible to understand law-writing in this way: proper laws are padded, symbolic-rhetorical version of law filled with moral admonition, elegant turns of phrases, and imperial ideology. The Romans and Byzantines were perfectly capable, of course, of extracting and abstracting (more or less) pure rule content. The civil codifications (quite explicitly), the synopses, the systematic rubrics, the later Byzantine handbooks, even the *Institutes* – all are witnesses to such rule-extraction. Nevertheless, it is always quite clear that *these* texts are in a

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The question is common in ancient near-eastern law, where the matter is often contested between those who wish to see the ancient codes as "real" law (i.e. of practical rule-force of a formalist type) and those who see them as only symbolic/propogandistic, or perhaps academic, in orientation; see Westbrook 1985, Roth 2000.

[172] Haldon 1990,258.

[173] As Fögen 1987,147 puts it, making this very point.

[174] See *Laws* 721b-e, an extraordinary passage, where Plato gives an example of a law in a short, "pure" rule form (the wrong way of legislating), and a longer, pedagogically and philosophically "padded" version (the correct way).

sense the secondary forms of the law: they are the practical handbooks and the aids for day-to-day operations. When one writes a real law in late antiquity and Byzantium – i.e. a proper, full imperial novel – all of the padded and extraneous bits tend to resurface. Voss's work is in many ways the ideal illustration of this phenomenon. If he is correct that the late Roman imperial chancery tended to produce two types of texts for laws – properly coherent and regular rule texts for internal use, and rhetorically ornate versions embellished by the quaestors for publication – it is clear that the real, i.e. published law *is the rhetorical version*. This version of the law is the version marked as culturally important, high-status and valued. Anything else is for quiet technical in-house consumption.[175] Although we might still wish to idealize and study this (murky) bureaucratic underworld of technical legal coherence and pure rule expression as law's "real" life,[176] it is quite clear that late Romans and Byzantines would tend to do the opposite. Law in its most ideal form, its most proper form, does not simply confine itself to pure rule content. It is *supposed* to be filled with broader cultural padding.

The "extraneous" elements in the canons may be analyzed as a variety of compositional features, themes, emphases, and strategies *around* the pure and technical rule content. For convenience, this material may be analyzed in two stages. First, three fundamental discourses or framework strategies may be identified that convey, present and colour the rule material. These represent the basic functions, agendas, and modes of presentation of the "extraneous" material. Second, the most prominent assemblages of ideas, motifs, images, references, and inter-textual connections may be examined individually. These represent the fundamental contextual referents of the canons as a whole.

1. Three Principal Discourses: Tradition, Pedagogy Persuasion

Aside from conveying rules, the canons "do" three other principal things. First, the canons tend to *look backwards*: they speak to and from tradition. The canons are thus constantly positioning themselves in relation to older rule material, and speaking to the present from the past. Second, the canons *teach*. The canons are constantly explaining, re-enforcing, or drawing out the broader consequences of the rule material. Third, and closely related to the second, the canons *persuade* and *dissuade*. The canons exhort and

[175] Voss 1982.
[176] See for example Honoré 2004,119, concerned to noe that contemporaries in late antiquity could "read between the lines" of their rhetoric legal texts to understand the real (legal) meaning. This is a good example of wanting to read *through* the rhetoric *to* law, instead of reading the rhetoric *as* law.

chastise, honour and dishonour, and generally employ numerous rhetorical devices to encourage or discourage certain types of behaviour.

The discourse of tradition is extremely pervasive.[177] It entails the constant positioning of the rule-writing against a broader background of regulative tradition. This positioning may entail a number of different relations. The dominant relation is that of coherence and adherence: one writes rules "according to" past authorities, or as simply renewing older authorities. It may often, however, also involve some type of clarification, interpretation, modification (often a relaxation) or extension. Thus, for example, Ancyra 21 relaxes a "earlier rule" (πρότερος ὅρος) on women who engage in abortion from life-long excommunication to ten years; Chalcedon 28 brings out further consequences for patriarchal rights of Constantinople 2; Trullo 6 clarifies that only readers and cantors may marry after ordination, slightly modifying an clarifying earlier rulings (Apostolic 26; Ancyra 10); and so on. At times this interpretative relationship may become so pronounced as to transform canons into virtual commentaries on older rules, especially when the traditional rule is listed very near the head of the canon. This is true of many of Basil's longer rules, but may also be found elsewhere.[178] Sometimes older traditions are also more or less simply rejected – although usually on the basis of yet other traditions. Basil 1, with extensive traditional argumentation, explicitly contests Dionysius of Alexandria and Cyprian's views on re-baptism; or Trullo 12, with reference to Scripture, essentially overturns Apostolic 5, which permitted episcopal marriages.[179]

There are three primary traditional referents: 1) Scripture; 2) specific canonical rulings; 3) vaguer "customs" or "traditions" "of the fathers". The last group, the most nebulous, includes references to ἔθη, παραδόσεις, ὁ κανών (in its older, more generic sense), and similar concepts. Occasionally, especially in the second-wave sources, other specific patristic and liturgical sources are also cited as traditional authorities.[180]

Scriptural referencing – referencing to the ultimate source of traditional authority – is the most common and persistent in the corpus as a whole. Its distribution is nevertheless irregular. Its presence may be felt most intensely in the earliest material,

[177] For some discussion of similar tendencies in the secular legal literature, see Honig 1960,127-144. Humfress 2005,171 is right, I think, to see even Justinian's legislation as presenting itself as fundamentally rooted in the past.
[178] For example, Nicaea 2, 5, 13; Basil: 2, 4, 7, 8, 9, 13, 18, 26; Gregory of Nyssa; Chalcedon 28; Trullo 6; II Nicaea 3, 6, perhaps 12; Protodeutera 8-11.
[179] Trullo is particularly notable for its confrontation, to various degrees, of earlier rules. See 3, 12, 13, 28, 30, 32, 33, 40, 55, 65.
[180] See Appendix C (10).

especially the patristic writings of Dionysius, Peter, and Gregory Thaumatourgos, Athanasius 1, and in the latest material, i.e. the second-wave material.[181] It is at its least intense, not surprisingly, in the very laconic legislation of Neocaesarea, Gangra, and Laodicea, and in narrowly administrative types of documents, such as Theophilus' ὑπομνηστικόν. Even in these canons, however, it can emerge quite prominently (e.g., Neocaesearea 15). In the Apostles, it presence is especially pronounced. In this, it is very interesting that even the Apostolic Canons "look backwards" and ground their decisions in even earlier tradition: Jesus' teaching, the Old Testament, and the Apostles' own actions and writings in the New Testament.[182]

The second type of references, to earlier more or less specific canonical rulings, is also very common. It too can become rare in some of the shortest 4th C canons, but it is, overall, surprisingly consistent across the entire corpus. From virtually its inception to its end the canonical material is thus being written – very consciously – against the background of a quite substantial and concrete rule-world.[183] The table above in section A is a good guide to its distribution. For more details, and examples, see Appendix C (11).

The third, less specific type of expression of traditional adherence (sometimes rejection)[184] is no less frequent. The canons are littered with expressions such as "according to the ecclesiastical canon" (in a general sense; Laodicea 1); "the majority said that..." (Neocaesarea 9); "it has been judged by the fathers that..." (Gregory Nyss. 2); "the ancients judged that...it seems good to those from the beginning that...it seemed good to the ancients that...our fathers considered that.... (Basil 1, 18); according to the prevailing usage (συνήθεια) (Constantinople 2);[185] "following everywhere the decrees of the holy fathers... according to custom (ἔθος) (Chalcedon 28);[186] or "according to a most ancient tradition..." (παράδοσις)(Trullo 69)[187]. Sometimes whole sources are

[181] In Trullo, for example, see the use of Scripture in 7, 12, 13, 16, 54, 60, 61, 64, 65, 67, 70, 72, 76, 83, 85, 88, 89, (somewhat less so) 100, and 101; or in II Nicaea 2, 4, 5, 7, 12, 13, 15, 16, 18, 22.
[182] See for example Apostles 3, 25, 27, 29, 41.
[183] This has often been remarked for the early tradition in particular; see, for example, *Fonti* 2.500-501; Hess 2002,77-79; Schwartz 1936a,179-181, 186-187. Broadly relevant to this phenomenon is the discussion of the interrelationship and dependence of norms in early canonical sources; see *Sources* Apostles; Ohme 1998 *passim*;; cf. too the notes in the Deferrari translation (1926) of Basil's canonical epistles.
[184] E.g. Nicaea 15; Basil 21; Gregory Nyss. 8; Trullo 28, 65.
[185] For further συνήθεια references, see Nicaea 7, 15, 18 (cf. 6 σύνηθες); Constantinople 2, 7; Carthage 70; Trullo 39; II Nicaea 15; Basil 3, 4, 21, 89, 91, 92; Gregory Nyss. 8.
[186] For further ἔθος references, see Nicaea 6; Ephesus 8; Chalcedon 30; Trullo 28, 37, 39, 62, 65, 90; II Nicaea 7, 14; Basil 87, 91, 92; Theophilus 1, 2, 3.
[187] For further παράδοσις references, see Nicaea 7; Gangra Epilogue; Carthage 3, 24; Chalcedon 8; Trullo 29, 69; II Nicaea 7; Basil 91-92; Peter 15; Gregory Nyss. 6.

framed by such general professions of traditional loyalty, most notably Gangra, Carthage, Trullo and II Nicaea, as already noted in chapter two.

The full force of all of these types of expressions is best illustrated by examples which combine all types of traditional texturing. Nicaea, for example, despite its own sense of authority as a "holy and great council" (canon 8, 14, 15, 18), is particularly full of such references, constantly articulating its legislation with reference to past authorities. Thus canon 2 begins by condemning ordinations "against the ecclesiastical canon"; canon 5 introduces its topic very clearly with the citing and affirmation of "the opinion/decision according to the canon..." (ἡ γνώμη κατὰ τὸν κανόνα); canons 6 and 7 famously start "Let the ancient customs prevail..." and then later "Since a usage and ancient tradition has prevailed..."; canon 13, very much like 5, treats its topic commentary-style with the citation of "the ancient and canonical law" (ὁ παλαιὸς καὶ κανονικὸς νόμος), which is to be preserved "even now"; canon 15 treats the transfer of clergy as entirely a traditional problem, namely that of a bad συνήθεια that is "against the canon"; canon 16 starts by chastising those who neither fear God nor know "the ecclesiastical canon"; canon 17 takes as its starting point the fact that some have "forgotten" the scriptural rule against lending at interest (Prov. 26:11); and finally canon 18 begins with condemning a practice by asserting that "neither the canon or usage has handed down that...", a combination of three common tradition-vocabulary words (κανών, συνήθεια and παραδιδ-) . In other canons traditional references are present, if not in the lead position. Thus canon 9 mentions those "acting against the canon" and canon 10 does not permit ignorance to prejudice the canon: "this does not prejudice [προκρίνει] the canon".[188]

Other examples may be found in Appendix C (12).

The second major discourse in the canons is that of pedagogy. We have already noted that pedagogy is hard-wired into the ancient conceptualization of law: law *is* pedagogy of the social soul, and it presumes patterns of social, spiritual, and moral education.[189] For a modern reader, however, pedagogical stylization is one the strangest aspects of ancient law, and one of the most important factors in creating a sense of canonical rule-discourse as distinctly foreign and archaic.

Its most obvious manifestation are those sources which, by their very genre, topic and composition, are primarily didactic or argumentative treatises. The

[188] In both these cases, however, it is just possible these usages of "canon" should be read in these sense of "register of clergy".
[189] See chapter 2.B.2.

pedagogical aspects and strategies of these texts are so obvious as to require no comment: by their very act of providing an argument, they are teaching. Broadly, virtually all of the material in the form of a non-conciliar letter or actual treatise – i.e. much of the patristic material – could be counted in this category.[190]

Pedagogical stylization is more surprising in the conciliar material, and in the patristic material that more closely approximates the conciliar style of legislation. In this material, pedagogical discourse may be defined as any type of construction that, not strictly necessary for the articulation of the rule at hand (as a rule, pedagogical constructions can be removed from a canon without any change in the canon's basic content, or even grammar), but that provides some type of additional background, explanation or rationale for the rule at hand. These thus "unpack" some further consequence, context, motive, or principle of the rule-content at hand. This unpacking may be moral, psychological, theological, philosophical, scriptural (here overlapping with traditional discourse), or even broadly legal-doctrinal in tone. In all cases, it makes the canons speak to some type of reality beyond their mere rule-content.

In practice, instances of pedagogical styling often takes the form of short epexegetical asides set off by ὡς, γάρ, ἵνα, ὅπως, ὥστε or the like. A typical example is Apostles 22: someone who castrates himself cannot become a cleric, "for he has become a murder of himself and any enemy of the creation of God". We thus learn both the rationale and the full implications of such behaviour. In Nicaea 5 we learn the reason for the prescription of a pre-Lenten synod: "so that a pure gift might be offered to God with all small-mindedness taken away" (μικροψυχίας ἀναιρουμένης). Another, more extended example, can be found in Ephesus 8, where the consequences of the Antiochian usurpation of Cypriot rights are drawn out at great length and scope: "[the Antiochians are to give up the usurped province] lest the canons of the fathers be transgressed, or the vanities of worldly authority be brought in under pretext of sacred work, or we lose, without knowing it, little by little the liberty which our Lord Jesus Christ, the deliver of all men, has given us by his own blood." (trans. *NPNF* 235, altered). Such transgressions apparently imply a breaking of custom, worldliness, and a violation of the very salvific freedom given in the blood of Christ. Very frequently a Scriptural passage is offered as the explanation or "lesson". Thus in Basil 41 a widow

[190] The most obviously didactic texts are Dionysius 1, Athanasius 1, Basil 87, 90, 91, 92, Gennadius, and Tarasios. They all contain definite rule content, but it is deeply buried within didactic scaffolding. Lesser examples include Gregory Thaum., Peter, the rest of Athanasius, Gregory of Nyssa, and much of Cyril; much less so Basil's remaining canonical letters (although, as noted, they are introduced as highly didactic in tone and goal), Timothy and Theophilus.

with authority over herself is allowed to live with a man "since the Apostles says: 'if her husband dies, she is free to marry whom she wishes; only in the Lord' [1 Cor 7:39]". Apostles 52 employs considerable pathos when it deposes clergy who reject repentant sinners "because it grieves Christ who said 'there is joy in heaven when one sinner repents'". Gangra 17 can't resist the scriptural gloss, and rather ponderous deduction, for why a woman must not cut her hair: "If a woman...should cut her hair, which God gave to her as a reminder of her subordination, so that she would be setting aside the commandment of subordination, let her be anathema". Such short pedagogical glosses are very common, and may be found throughout the corpus. [191]

In the second wave, when some of the canons begin to approximate mini didactic-treatises, pedagogical styling can become quite pronounced and sustained.[192] II Nicaea 2, for example, begins with a framing scriptural exhortation to "meditate upon thy statutes", as well as the reminder that to do so is "saving" for all Christians, and especially the hierarchy. It later moves on to a patristic gloss on the necessity of learning Scripture – "for the God-given oracles, that is the true knowledge of the divine scripture, is the essence of our hierarchy" (οὐσία γὰρ τῆς καθ᾽ ἡμᾶς ἱεραρχίας ἐστὶ τὰ θεοπαράδοτα λόγια εἰτοῦν ἡ τῶν θείων γραφῶν ἀληθινὴ ἐπιστήμη) – and closes with another Scriptural passage warning of God's rejection of those that reject knowledge.

This pattern of opening and/or closing with small pedagogical contextualizations, often scriptural, may be found a number of times in Trullo and II Nicaea, but especially in Protodeutera, where it is virtually the norm.[193] Protodeutera 1 is a good example. It begins with a moralizing traditional commentary (a faux *narratio*) on the restoration of monasteries: "The restoration of monasteries has of old always been considered a sacred and honorable thing by our blessed and holy fathers, but today is seen to be practiced badly." Other pedagogical styling continues as it gives an unflattering description of the motivations of its target, private owners of monasteries, as "contriving to consecrate to God only in name", before eventually concluding with a

[191] Ancyra, Gangra and Theophilus are the only sources to contain only a few each. Most contain many more. They are especially prominent in the Apostolic canons, where over half contain some type of similar explanatory aside or Scriptural example/ampflication: 8, 9, 13, 16, 22, 23, 24, 25, 26, 27, 29, 31, 33, 34, 36, 38, 39, 40, 41, 46, 47, 49, 50, 51, 52, 53, 55, 59, 60, 63, 64, 68, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83.

[192] In addition to the examples cited below, see esp. Trullo 7, 64, 73, 82, 88, 101, 102; II Nicaea 1, 4, 6 15, 22; and all of Protodeutera, aside from 16.

[193] See Trullo 40, 60, 3, 96; II Nicaea 1, 2, 4, 5, 7, 16, 18, 22; in Protodeutera, all canons but 9 and 14 contain some form of it. It may also be found occasionally in the first wave, for example in Serdica 1, which begins and ends with short moral harangues, or Ephesus 8 which begins with a lengthy meditation on the vagaries of pastoral leadership. For a similar phenomenon in Byzantine secular laws, see Hunger 1964,191-203.

final condemnation-via-rhetorical-question: "for if one does not remain owner of those things which one gives to a man, how will one be permitted to seize ownership of those things which one consecrates and dedicates to God?"

A much more extensive example is found in II Nicaea 5, which begins with this immense preface:

> It is a "sin unto death" [1 John 5:16] when men incorrigibly continue in their sin; but they sin more and deeply who proudly lifting themselves up oppose piety and sincerity, accounting mammon of more worth than obedience to God, and caring nothing for his canonical precepts. The Lord God is not found among such, unless perchance having been humbled by their own fall, they return to a sober mind. It behooves them the rather to turn to God with a contrite heart and to pray for forgiveness and pardon of so grave a sin and no longer to boast in an unholy gift, for the Lord is near to them who are of a contrite heart. With regard, therefore...[the rule content begins]. (Translation from *NPNF* 558-559, altered)

Usually such "theological" introductions are shorter. Trullo 40, for example, opens "Since it is a very salutary thing to cleave to God on account of withdrawal from the tumults of life..." or Trullo 73 with "The life-giving cross has shown us salvation, and we ought thus with all assiduousness to render worth honour to it, through which we have been saved from the ancient fall. Whence..."

Finally, Trullo 96 is one of the best examples in the corpus of this type of pedagogical ornamentation. It contains perhaps two lines of rule-content (highlighted) embedded in a mini-homily on the evils of extravagant hair-dos:

> Those who through baptism have put on Christ have promised to imitate his life in the flesh. **In the case of those men,** therefore**, who** to the detriment of those who see them **arrange the hair on their head in elaborate plaits**, offering allurement to unstable souls, **we shall treat them paternally, with an appropriate penalty,** educating them and teaching them to live prudently; so that once they have given up the error and vanity of material things they may direct their mind constantly toward the blessed and imperishable life, may preserve chaste behaviour in fear of God, may draw near to God, in so far as possible, through pureness of life, and may adorn the inner rather than the outer man with virtues and honest and blameless manners; and thus they will bear in themselves no trace of the enemy's perversity. **If anyone behaves contrary to the present canon, he shall be excommunicated.** (Translation from *NPNF* 406, altered)

A relatively simple rule is turned into an extensive moral, philosophical and theological lesson.

The final mode of canonical discourse, the discourse of persuasion, is the least common in terms of direct, citable instances, but is nevertheless a very prominent aspect of the corpus' language. It is particularly difficult to extract and analyze because many

of its instances overlap with those of the discourses of tradition and pedagogy: most appeals to tradition are broadly intended to persuade the reader to obedience, and the pedagogical highlighting of motives, consequence, or dispositions function to persuade to or dissuade from various types of action.

Specific elements of the discourse of persuasion/dissuasion may nevertheless be discerned. Unlike the other two discourses, it is mostly a function of tone and style, created by patterns of hyperbole, amplification, deprecation, laudation and, generally, the rhetorical "charging" of language. Its effect is usually to induce a strong, often emotional complicity of the reader with a rule's intention and content. It is perhaps best termed the "discourse of moral outrage", after its most normal mode, but it also exists in other more irenic and dialogical forms.[194]

One of its most dramatic incarnations is the tendency to stylize infractions with language implying insolence and impudence. Thus Antioch 1, for example, wrongdoers are constantly "daring" (τολμέω) to commit infractions: "All those who dare to set aside the decree... and if one of those who preside in the church...dare to act on his own... and those who dare to communicate with them...". Similarly, in Antioch 5 priests and deacons who separated themselves from their bishop are "despising" (καταφρονέω) him. Likewise at the opposite end of the corpus Hagia Sophia 3 speaks similarly about laity "puffed up with authority" and "despising"(αὐθεντήσας καὶ καταφρονήσας) commands, and "deriding" (καταγελάσας) the laws of the church, "daring" (τολμήσειεν) to striking a bishop. Other examples are not difficult to find.[195]

Another type of hyperbolic and dramatic phrasing may also be noted. In Antioch 16 a bishop "hurls" (ἐπιῤῥίψας) himself at a vacant church, and "snatches" (ὑφαρπάζοι) its throne. Likewise in Laodicea 36 one "hurls" (ῥίπτεσθαι; instead of employing the usual βαλ- root) out of the church clergy wearing phylacteries. In canon 35 of the same council one dramatically "forsakes" (ἐγκαταλείπω) Christ and the church by engaging in angel invocation. In Chalcedon 22 a cleric wrongfully "snatches" (διαρπάζειν) the goods of a bishop. Protodeutera 1, just cited, also speaks of "snatching" ownership over monasteries (ὑφαρπάζειν). Sardica, which contains a number of very highly charged canons, begins its first canon with wonderful hyperbole, noting of the transfer of bishop that "there is no more awful custom in need of being uprooted from

[194] See Lanata 1989 for examples of similar patterns in Justinian's Novels.
[195] E.g. Apostolic 28, 31, 74; Nicea 1, 16; Gangra 3, 6, 11; Serdica 7, 11, 13, 21; Antioch 1, 4, 10, 11, 12, 13, and 22; Constantinople 6; Ephesus 4, 7; Chalcedon 7, 8, 10, 12; Protodeutera 7, 10.

its foundation than the most harmful, corrupt practice...[of transferring bishops]" – there is no worse!

Very frequently the behaviour of wrong-doers is stylized in highly contemptuous terms. In Nicaea 2, for example, one who disobeys the council does so "audaciously" (θρασυνόμενος). In Antioch 1 those opposing the decree of Nicaea do so "for love of strife" (φιλονεικότερον). Gangra 20 cannot help but note that those who disparage assemblies of the faithful do so "in a disposition of arrogance" (ὑπερηφάνῳ διαθέσει), and in 12, 14, 17, 18 it places the asceticism and piety of its targets in distinct quotation marks – the supposed "ascesis" or the supposed "piety" (νομιζομένη ἄσκησις, νομιζομένη θεοσέβεια). Constantinople 6, especially in its introduction and conclusion, goes out of its way to paint decidedly negative pictures of those it wishes to condemn: they act, for example, "with love of enmity and as false-accusers" (φιλέχθρως καὶ συκοφαντικῶς), wishing to do nothing other than ruin the reputation of priests and whip up "troubles" among the laity. Ultimately, they are simply "outraging [καθυβρίσαντα] the canons and ruining good ecclesiastical order". Similarly in Chalcedon wrongdoers often act "on account of" or "according to" all sorts of bad dispositions: love of gain (δι' αἰσχροκερδίαν), love of money (διὰ φιλαργυρίαν), "arrogantly" (κατ' αὐθάδειαν), "on account of the desire of empty glory" (διὰ δόξης κενῆς ἐπιθυμίαν) – or once, in the case of good behaviour, "on account of the fear of the lord" (διὰ τὸν φόβον τοῦ κυρίου).[196] Further examples may be found in Appendix C (13).

At times this type of emotional and dramatic "charging" can be sustained across almost an entire source. This is particularly true in some of the longer patristic letters and treatises. A good example may be found in one of the very earliest sources. Gregory Thaumatourgos' letter begins with a very calm and moderate consideration of an initial problem (canon 1), but in canon 2 the tension begins to mount when Gregory notes that there is not enough room in one letter to convey all of the scriptural passages that denounce greed and robbery, and then proceeds to focus on a Scriptural exposé of how the wrath of God will fall upon the church if the sinners are not expelled. He then begins to ask rhetorical questions of the reader – will not the wrath of God fall on his interlocutor as well? Did not the wrath of God fall on Achar? (Canon 3) Did the wrath of God not only on Achar, but others around him as well? And as to those who have stolen things on the pretext of "finding" them (now in canon 4) – "let no one deceive himself!" In scripture, he continues, one is not allowed to benefit from an enemy's

[196] Chalcedon 2, 3, 8, 10.

misfortune in peace time – how much less then now are Christians not to benefit from the misfortune of their brothers during war? In canon 6 the tension comes to a crescendo as a report is received that is "unbelievable" (ἀπηγγέλη δέ τι ἡμῖν καὶ ἄπιστον): Christians are keeping Christian captives, escaped from barbarians, as slaves. An emissary is to be sent to address the problem, μὴ καὶ σκηπτοὶ πέσωσιν ἐπὶ τοὺς τὰ τοιαῦτα πράσσοντας! Lightning *can* strike in the canons.

More moderate but similar examples of the sustained building of annoyance or tension may be felt in Cyril 1-3 or Basil 87, 90.

Gentler forms of persuasion may also be found. In Ephesus 9, for example, the reader is drawn along with the council's decision through a deft weaving of images of the grief and troubles suffered by Eustathius, and particularly of his inexperience and isolation, and the pathetic topos of the weeping and injured old man ("we all felt for this old man and considered his tears to be our own") who had made mistakes "far away from his home city and dwellings of his fathers for such a long time". Similar in effect are the lengthy and affective descriptions of the sufferings of noble lapsi (e.g. Ancyra 3, 5, "shouting that they are Christians", "crying", "prostrating") to garner support for relaxed punishments.

Other similar examples may be found in Neocaesarea, a source that has the curious habit of speaking directly to the reader, subtly inviting the reader into complicity with its conclusions. The most obvious instance is canon 7, forbidding priests to attend banquets of digamists, where a rhetorical question invites the reader to come to the same "obvious" conclusion: "for if the digamist must do penance, what type of priest will he be who through his attendance approves the marriage?" Canon 14, likewise, directly tells the reader to search in Acts. Much more subtly, canons 2 (its last clause) and 4, perhaps originally answering specific questions, now lack real rule content but seem to invite the reader to join them in thinking out loud: "But if the woman or man in such a marriage should die, penance for the survivor will be very difficult"; "If a man, desiring a woman, should intend to sleep with her, and his desire comes to nothing, it seems that he has been saved by grace." Rhetorical questions, as already noted, are also evident elsewhere in the corpus.[197]

[197] E.g. Apostles 46 ; Gregory Thaum. 2,3,4; Basil 27, 29, 48; Gennadius; Protodeutera 1, 3, 10. Related are the occasional use of "it is clear" or "obviously" (δῆλον, πρόδηλον), such as in Nicaea 1, 6, to assume complicity, or the *a minori ad maius* trope (if "x" is true then "y" must be all the more true), as in Apostolic 41 or Chalcedon 18. Both enforce a sense of the "obviousness" of the ruling to the reader.

2. Principal "Assemblages": the basic contexts

All three modes of "extraneous" canonical discourse are fundamentally inter-textual: they link the canons into a broader network of texts and the value narratives they contain. A number of texts and "assemblages" of subject, ideas, motifs, and images may be discerned as forming particularly prominent and regular nodes along this network.[198]

a. Scripture

The single most prominent text cited within the canons – by far – is Scripture, both Old and New Testaments. Over 180 canons[199] contain at least one reasonably clear Scriptural reference, and often citation. This exceeds even the number of canons (~120) with more or less clear references to other canonical rules, the second most common referents. (Even if one includes broader references to tradition, "the fathers", and custom, I estimate the total does not much exceed 150 canons). Non-canonical patristic references and other legal references/allusions are a very distant third (~ 15)[200]. Scripture may thus – not surprisingly – be considered the preeminent textual referent of the canons. It forms the basic contextual backdrop against which the canons are set, just as the traditional introductions suggest.

Scripture's presence is nevertheless highly variable in content, form and function. Across the corpus as a whole, there is little systematic or rationalized about its employment. It suggests itself instead as a pool of highly flexible, infinitely relevant contextual referents that can be adapted and adopted for virtually any compositional need. In effect, a broad literary coherence of the canons and Scripture is implied: the canons naturally and easily speak out of Scripture, and with Scripture. In this sense too, then, the canons become a broadly "scriptural" text.

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[198] Many of the following may also be found in the secular legal literature, frequently discussed in scholarship as elements of the narratives of the "rhetoricization", "ethicization" or "Christianization" of law; see especially the studies of Biondi 1952, Honig 1960, Hunger 1964.

[199] By my own count; see also the index in *Fonti* 4 which counts approximately 380 scriptural citations in total (although this list is not complete). Akanthopoulos 1992,26 counts 349 *canons* which contain Scriptural references, a number I can account for only if every possible resonance and allusion is included. (However, Akanthopoulos' broader treatment of Scripture in the canons, Ἱεροὶ Κανόι Κανόνες καὶ μετάφραση τῆς Ἁγίας Γραφῆς in Εἰσηγήσεις Δ΄ Συνάξεως Ὀρθοδόξων Βιβλικῶν Θεολόγων Thessaloniki 1986:189-190, was unfortnately not available for consulation.)

[200] I.e. the aforementioned patristic citations and *regulae* type material.

No thorough study of Scripture in the canonical tradition has ever been undertaken, east or west,[201] but three types of Scriptural references may be tentatively identified. The first and most productive group encompasses those which provide some type of further confirmation, explanation, or rationale for a given rule; frequently the rule is cast as naturally following from the Scriptural citation, as from a general principle or rule. A good example is Apostolic 46, where the acceptance of heretical baptism is rejected "for what agreement does Christ have with Belial, or a believer with an unbeliever?" (2 Cor 6:15); or Ephesus 8's citation of "Christ's freedom" (Gal 5:1) in reference to jurisdictional independence; or Trullo100, which takes its starting point against pornography from Proverbs 4:23, 25, "Let your eyes see straight... keep your heart under secure guard"

Sometimes such references or allusions can become even more vague, and are best described as "Scriptural texturing" or ornamentation, the second type. These lend the canonical texts a Scriptural tonality, and are very broadly supportive of the given regulation, but tend not to relate directly to the given rule content. Thus in Nicaea 12, for example, those who have returned to military/secular pursuits after having become Christians are glossed as "dogs returning to their vomit" (Prov 26:11; 2 Pet 2:22); Neocaesarea 5, speaking about fallen catechumens becoming "hearers", adds "sinning no more" (John 5:14; 8:11); Trullo 96 speaks about virtuous Christians in terms of them adorning "the inner man rather than the outer" (Gal 3:27); or much of the preface of II Nicaea 5, cited above, might be counted here.

The rarest type, the third, sometimes blurring with the first, is encountered when a Scriptural passage functions as a bearer of some element of specific rule content which is simply repeated and applied. Thus, for example, Nicaea 2 forbids the ordination of newly baptized Christians with a citation of 1 Tim 3:6-7 ("not a neophyte..."); Basil 11 explicitly follows Exodus 21:18-19 in determining criteria for voluntary and involuntary murders; Trullo 67 forbids eating blood with direct reference to Acts 15:29; Carthage 59 refers to 1 Cor 6:1 as the basis for the "apostolic right" (ἀποστολικὸν δίκαιον) of Christians to appear before an ecclesial tribunal; Gennadius cites Act 8 against simony. Sometimes this explicit Scriptural rule-sourcing may be rather odd by modern standards, as when Peter derives penitential tariffs from various Scriptural numbers (e.g. canon 1 with 40 days on the model of Christ's period of

[201] See Helmholz 1995,1557-1558 on the poor state of literature for even high medieval canon law, but see generally Gaudemet 1984 and Pieler 1997, and the references in the following note.

struggle in the wilderness after his baptism; or canon 3 with four years of penance because of their likeness to the four years' fruit that was expected from the sterile fig tree (Luke 13:6-9)).

One approach to Scriptural rules is, however, conspicuously absent: at no point are the Scriptures systematically "mined" for rules, which are then added to the corpus.[202] The citing or referencing of concrete, substantive Scriptural rules is in fact surprisingly rare and desultory – and exceptionally so when the Scriptural rule is mostly constitutive of a canon.[203] In general, a concrete Scriptural rule is cited as a principle, parallel or confirmation of a canonical rule – which are usually slightly different from, or in addition to, Scriptural rules.

This curious neglect is significant, and conveys an obvious but very important assumption of the canonical texts: Scriptural rules stand on their own. They are not to be repeated, or extracted, as the canons already assume their presence. The canons are thus a different, and in fact lower, form of rule-text, continuous with Scripture, and rooted in it, but ultimately a kind of companion and supplement to the *real* rule-book.[204] In one place, the tradition comes very close to saying this. Carthage 5, considering the problem of priests taking interest on loans, states: "those things which divine scripture has clearly ordained, it is not for us to vote upon, but rather to follow" – in this case, the Scriptural rules on interest for laity are to apply to clerics as well. Gregory of Nyssa likewise speaks clearly in canons 5 and 6 of Scripture covering many rules not treated by the penitential traditions. Once again, then, the pairing, and yet hierarchical ordering, of Scripture and canons emerges. Both constitute essential and "in force" pools of regulative texts, and both are inter-related, but the latter is clearly dependant upon, and subordinate to the former.[205] The canons do not replace Scripture as the regulative texts, nor do they develop isolated from Scripture – but they are to be broadly "scriptural".

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[202] The only major exception in the Byzantine legal tradition seems to be the 8th C νόμος Μωσαϊκός, a small collection of rules from the Penateuch. See Appendix C (14) for details. In the west, however, "mining" Scripture for rules in the canonical collections seems to have been more common, principally, and first, in early 8th C Ireland and then more broadly. See Fournier 1931,64-68; Gaudemet 1984; Kottje 1970; Sheehy 1987; Wasserchleben 1885,xiv-xvi.

[203] The best candidate is probably Apostolic 63, conveying the dietary laws of Gen 9:4, Ex 22:30, Lev 5:2 and Acts 15:29 (surprisingly not exclusively Acts 15:29, as Trullo 67). But even it does not simply cite one Scriptural rule as its exclusive content.

[204] Cf. Pieler 1991,21 on the primary importance of Scripture in Zonaras' commentary – equivalent, Pieler feels, to the position of imperial laws in secular juristic writings.

[205] The statement in Beck 1981,7 that the bible has only a "subsidiary" role in Byzantine law is thus in a sense misleading; the tradition more obviously sees the canons as the subsidiary rules of Scripture!

b. Morality and metaphysics

If Scripture is the preeminent textual referent for the canons, morality and metaphysics are the preeminent topical preoccupations. The canons constantly speak to moral and metaphysical realities beyond basic legal rule-logical realities, regularly unpacking the substantive moral values, beliefs, and standards of behaviour within and around the specific rules themselves.

One of the most striking and common emphases in this regard, echoing the traditional prologues, is the tendency to speak to internal dispositions, attitudes, emotions and motives. The canons are very often – and very strangely by modern standards – prescriptive and proscriptive of both the *what* of behaviour and the *how* of behaviour. Indeed, the two are seen as closely linked. Negative behaviour is frequently seen as connected to some negative disposition, attitude, intention or motive, and positive to positive. Most often, wrong-doing is cast as a function of vice.

Many examples of such tendencies have already been offered, including much of the language of "moral outrage" (wrong-doers as "despising", "daring" and so forth), or the glossing of motivations as "on account of" various vices and evil dispositions. The effect of these is to suggest that to commit canonical wrongs is to act in a morally defective manner. Sometimes "passions", as in the prologues, are explicitly targeted. Protodeutera 2, for example, condemns those who take up the monastic habit with vainglorious intentions ("so that by the reverence of the habit they might receive the glory of piety") as those who will "give their own passions abundant pleasure". Vices and dispositions are even to be directly taken into account in investigations of wrongdoing. Thus in Nicaea 5, in cases of the excommunication of priests, the bishop is to be examined lest "meanness of spirit or love of strife or any such unpleasantness" is involved; Sardica 14 is very similar, directing that any behaviour of *anger* of the bishop be investigated.

Positive behaviour, however, is also sometimes described and prescribed in terms of correct internal attitudes, motivations and dispositions. Thus in Antioch 24 and 25 episcopal property management is to take place "with good conscience and faith" and "with all piety and fear of God". Gangra 3 is concerned that slaves are not to run away, but to continue to serve their masters "with a good attitude" (μετ᾽ εὐνοίας). Dionysius 2 justifies its prohibition on menstruating women's communion by reference to what "faithful" (πίσται) and pious (εὐλαβεῖς) women would do. II Nicaea 1 has clergy depicted as law-abiding "gladly" (ἀσμένως), and who, through the words of

Scripture, "delight" (τέρπω) in the law and "rejoice" (ἀγαλλιάω) in it, and "hug [the canons] to their chests" (ἐνστερνίζομαι).

At times references to internal dispositions and vice/virtues can become quite sophisticated and involved, adopting the theoretical vocabulary of ancient spiritual psychology. The preeminent example is Gregory of Nyssa's canonical letter, which, as an intentional attempt to classify penitential material according to the standard psychological schema of λόγος, ἐπιθυμία, and θυμός, stands in a class of its own. Canonical regulation become a psychological-therapeutic practice. Other examples of analysis of internal dispositions and even emotions are easily found – see Appendix C (15).

Aside from dispositions, motives and virtues, the canons also sometimes speak directly to specific metaphysical ideas or concepts, Christian or Greco-Roman, either as a point of support or source, or as a ramification. In these instances, the canons speak "theologically" or "philosophically" (here, of course, not including those canons whose primary topic is a doctrinal matter)[206].

Many – even most – of the short Scriptural citations and short pedagogical epexegeseis cited above are doctrinal/theological in orientation, and needn't be repeated here; see Appendix C (16) for further examples. This "theological" discourse becomes most notable, however, when drawn out at length. Trullo 96, cited above, along with many of the longer, more elaborate examples of pedagogical styling evident in the second wave, and especially the many short "theological" introductions, are all especially good examples (e.g. II Nicea 14). A broad set of metaphysical narrative are being both assumed and inculcated.

Especially interesting are the few occasions when relatively technical Greco-Roman philosophical language (aside from the technical psychological language already noted, as for example in Gregory of Nyssa) makes appearance. This is particularly characteristic of Trullo, where, as observed, it is already evident in the Προσφωνητικός.[207] Thus in Trullo 41 monastics seek solitude not for "empty glory" but δι᾽ αὐτὸ τὸ ὄντως καλὸν, the "true Good"; also in Trullo 45 nuns are not to be again led to remember the things of her former life through the putting on of adornments of "this perishable and transient world" (φθαρτοῦ τε καὶ ῥέοντος κόσμου). Language of "materiality", hyle (ὕλη) also emerges briefly in Trullo 96 ("giving up the deception and

[206] That is, on Christological or Trinitarian heresies (Constantinople 1, 5; Ephesus 7; Trullo 1), Donatist beliefs about original sin (Carthage 110-116), or certain exegetical matters (e.g. Basil 15, 16).
[207] Chapter 2.A.5.

vanity of material things": ἀφέντας τὴν ἐκ τῆς ὕλης ἀπάτην καὶ ματαιότητα) and canon 101 (those receiving communion with metal receptacles are chastised as preferring "inanimate and lower matter",τὴν ἄψυχον ὕλην καὶ ὑποχείριον, to the icon of God). Of course most of these concepts are still quite generic, and long domesticated for Christian use

c. Honour and appearances

Another major theme in the corpus is an assemblage of ideas and terms relating to honour and appearances. These may be considered subsets of both moral disposition and theology discourse, prescribing and proscribing certain types of attitudes, moral standards and certain ways of thinking about the nature and implication of infractions. It embraces ideas of reputation, insult, mockery, respect, shame, suspicion and generally, "how things look". It is often a key component of the language of moral outrage: infractions are not simply infractions of an impersonal rule, but personal insults; wrongdoing is not simply "mistake", but insolence, and everything is happening in the public eye. Considering the well-known importance of these concepts in Greco-Roman political discourse, and literary culture, its presence in the canons is not surprising.[208]

It is perhaps most immediately noticeable as a subject of substantive regulation. (Our analysis is not as a rule concerned with the substantive content of the canonical rules, but here an exception must be made in order to convey the full force of this broad tendency.) Thus Apostolic 8 suspends clergy who do not reveal the reason for their not receiving communion precisely because this may create suspicion, ὑπόνοια, among the laity as to the purity of the offering. The entire canon is centered upon the mere *suspicion* of cultic inefficacy; i.e. it is meant to combat a mere perception or appearance of wrong – and not necessarily even a wrong itself – and particularly that which might affect cultic practice. Even more directly, in Apostolic 53, 54, 84 people are condemned who "insult", ὑβρίζω, bishops, presbyters, deacons, and the emperor or magistrates. (These rules should, of course, be read in the context of civil legal regulation of hubris, or libel, a very serious charge.[209]) In Basil 45 a complementary rule is issued that forbids "insulting" Christ.[210] In Laodicea 20, a provision is explicitly

[208] E.g. Brown 1992; Lendon 1997.
[209] E.g. *Digest* 47.10; *CJ* 9.35-36; *Institutes* 4.4
[210] Cf. Constantinople 6, which concludes with a condemnation of certain plaintiffs ὡς καθυβρισάντα τοὺς κανόνας καὶ τὴν ἐκκλησιαστικὴν λυμηνάμενον εὐταξιαν. Even the canons can be "insulted".

made for diaconal "honour": "similarly, the deacons are also to receive honour from the servers and all the clergy." Many other regulations may be found which treat the "honourable" appearance of Christians, various types of insults, and the problem of reputation and "suspicions" thereabout (especially regarding the good standing of plaintiffs). See Appendix C (17).

Similarly, honour language is embedded into the very language of institutional processes, offices and relationships (entirely coherent with general late antique use)[211]. In Nicaea 7 Jerusalem is "honoured", τιμᾶσθαι, and to have the "honour that follows" (ἀκολουθίαν τῆς τιμῆς), and Caesarea is to retain its ἀξίωμα, or *dignitas,* its office or rank, i.e. its "worthiness". Constantinople 3 raises the famous "prerogatives of honour", πρεσβεῖα τῆς τιμῆς, of Constantinople. Earlier it may be found used to describe the distinction of the metropolitan from his bishops in Antioch 9: "...when it seems good that he will also exceed them in honour" (καὶ τῇ τιμῇ προηγεῖσθαι αὐτον). Offices, ranks and functions are frequently referred to throughout the canons, as per normal late antique usage, as "honours" (with a variety of shades of meaning).[212]

On a more supplementary, epexegetical level, behaving honourably and avoiding shameful actions is a very common theme. Nicaea 17, for example, strongly textures its condemnation of clerical interest-taking with αἰσχρο- (shame) vocabulary: αισχροκέρδεια, αἰσχρου κέρδους ἕνεκα. Such activity brings "shame" to the clergy. Chalcedon 2 likewise speaks of αἰσχρὰ λήμματα, and Chalcedon 3 of αἰσχροκερδία. Chalcedon 4, conversely, begins its condemnation of busy-body monastics by noting how the honour of the monastic schema does properly accrues to monks who are "worthy" of it: "let those who come truly and purely to the monastic life be deemed worthy of the appropriate honour". The presence of this line as the formal introduction to the canon is significant: honour constitutes a basic conceptualization for characterizing, rewarding and promoting proper behaviour.

A sharp casting of canonical relations as honour/shame relations may also be found in Trullo 17 where a cleric who is registered in another church without release letters is described as "bringing shame [καταισχύνων] upon the one who ordained him". Carthage 138 also casts Aparius' activities as his αἰσχρότηται, his denial as ἀναισχυντία. In Sardica 20, the bishops are concerned that "the divine and most reverend name of the

[211] Cf. for example Jones 1964,377-390 on the *dignitates* and *honores* of the late imperial administration.
[212] Other examples include Apostolic 76; Nicaea 8; Ancyra 18; Antioch 5, 10; Serdica 10; Carthage 57 (probably). See Ancyra 1, 2; Antioch 18; Chalcedon 12 for the punishment of losing only the τιμή of one's office.

priesthood" is being brought into disrepute by the "shamelessness" of a few. Elsewhere similar concerns about shame, scandal, and "name" emerge with some frequency. See Appendix C (18) for further examples.

A particularly interesting sub-type of honour/appearance language, more subtle, but very effective, involves texturing infractions or their results as insults or acts of dishonour or mockery, often with ὑβρισ- vocabulary. Sardica 13 is perhaps the earliest example. The canon treats the problem of other bishops communing with clerics excommunicated by their bishop, but describes such infractions in terms of hubris: "[a bishop] ought not to inflict hybris upon his brother by offering him [the excommunicate] communion". Laodicea 27 likewise forbids a (somewhat obscure) disruption of church order "on account of the hybris that this inflicts upon the ecclesiastical order". Similarly, Carthage 138 speaks about the hybris inflicted upon the synod by Faustinus' attempts to appeal to Rome. Similar concepts are also to be found in Constantinople 6 (wrongdoers "insulting" the canons), Chalcedon 6 (at-large ordinations are to the "hybris" of the one who ordains), Chalcedon 15 (a fallen deaconess "insults" God's grace), Trullo 13 (the Roman practice of clerical celibacy "insults" marriage), Trullo 42 (false hermits "insult" their profession), and Basil 1 (Montanists "insult" the Holy Spirit).

Another important subset of honour/shame styling are explicit expressions of concern about the public appearance of actions. Thus Laodicea 27 condemns mixed-gendered bathing in terms of the response it might invoke from pagans: "for this is the first reproach among the pagans". Cyril 1, as already noted, casts canonical order as essentially concerned with the avoidance of "slander" (τῆς παρὰ τινων δυσφημίας) and the acquisition of "praise" from "right-thinking people" (τὰς παρὰ τῶν εὖ φρονούντων ευφημίας). A very striking and self-conscious audience reference may also be found in Protodeutera 1, where it is noted that sales of consecrated property "provides astonishment and an abominable scandal *to those who see it*" (θάμβος ὁμοῦ καὶ μύσος τοῖς ὁρῶσι παραεχόμενα)

Elsewhere the public audience is a little less explicit, yet still tangible. Apostolic 40 on the need to keep personal episcopal and ecclesial finances separate, phrases its rule in terms of keeping everything "evident" (φανερὰ) for all to see: "Let the bishop's own property be visible...and that of the church" (Ἔστω φανερὰ τὰ ἴδια τοῦ ἐπισκόπου πράγματα... καὶ φανερὰ τὰ τοῦ κυριακοῦ). Here the audience is even divine: "for this is just before God and men" (δίκαιον γὰρ τοῦτο παρὰ θεῷ καὶ ἀνθρώποις). The

same canon concludes with an unmistakable and typical concern for public scandal: its regulations are to avoid that "the death [of the bishop] be surrounded with slander" (τὸν αὐτοῦ θάνατον δυσφημίᾳ περιβάλλεσθαι). Sardica 20, on punishments for bishops, likewise includes a reference to human and divine "public": regulations are made "pleasing to God and to men" (καὶ θεῷ ἀρέσαντα καὶ ἀνθρώποις).

d. Purity, cleanliness and defilement

Rarer than honour/appearance language, although sometimes connected with it, is the discourse of purity, cleansing and defilement. It is nevertheless a striking and recurring feature of Byzantine canonical thought and expression. It is closely related to language of disease and contagion.

Its most obvious presence is (again) in the numerous substantive regulations that may be considered to somehow touch on purity: restrictions on Eucharistic participation because of blood or semen (e.g. Dionysius 2, Athanasius to Ammoun, Timothy 7); regulations on sexual purity relating to the reception of the Eucharist after licit sexual activity (Timothy 5, 13); restrictions on ordination and liturgical service because of both licit and illicit sexual activity (e.g. Neoceasarea 8; Laodicea 55; Theophilus 4; Carthage; Basil 27; Trullo 3, 13); problems of consanguinity (Basil 23, 67-68, 75, 76, 78, 79, 87; Trullo 53, 54); sexual defilement of women (e.g. Ancyra 11, Gregory Thaum. 1, Basil 22, 30, 38); other inappropriate types of sexual activities (homosexuality, bestiality, pornography – e.g. Ancyra 16; Basil 7, 63; Trullo 100 - more broadly, almost all the canons on fornication, adultery and polygamy may be included in this category); regulations on the defilement of sacred property and goods (Apostolic 73; Trullo 68, 97, 99; Protodeutera 10); regulations on food purity (usually condemning over-zealous ascetics showing βδελυρία, loathing or disgust, as in Apostolic 51, 53, 63; Ancyra 14; Basil 86; Gangra 2; Trullo 67); and purification from demon possession (Apostolic 79).[213]

The language of purity in these canons is usually pronounced, and need no extensive exposition. One aspect of this discourse is, however, noteworthy: sexual purity is treated very much like a physical contagion or wound. In this sense, purity

[213] Interestingly, one type of purity-thinking is explicitly rejected: lack of physical wholeness. In Apostolic 77 and 78 physical defects that do not "impede the affairs of the church" do not disqualify from ordination, "for the defect of the body does not defile a man, but defilement of the soul" (οὐ γὰρ λώβη σώματος αὐτὸν μιαίνει, ἀλλὰ ψυχῆς μολυσμός). It is important to note, however, that this is not a rejection of the concept of purity *per se*. In fact, it affirms the concept of spiritual impurity. It simply notes that physical "impurity" is not a true μιασμά.

language blends into medical language. For example, even ignorant engagement in illicit sexual activity by a clergyman is understood to impair completely his ability to serve. Basil 27, on clergy involved in unlawful marriages through ignorance, is the *locus classicus*: "it is illogical that one who should heal his own wounds can bless another; for blessing is the communication of holiness, but he who does not have holiness through a transgression of ignorance, how can he share it with another?" (εὐλογεῖν δὲ ἕτερον, τὸν τὰ οἰκεῖα τημελεῖν ὀφείλοντα τραύματα, ἀνακόλουθον. εὐλογία γὰρ ἁγιασμοῦ μετάδοσίς ἐστι, ὁ δὲ τοῦτο μὴ ἔχων, διὰ τὸ ἐκ τῆς ἀγνοίας παράπτωμα πῶς ἑτέρῳ μεταδώσει.) This logic – and even the phrases – will be repeated in Trullo 3 and 26. Impurity impairs the very capacity for sacral activity; one is virtually physically damaged.

Outside of these areas of substantive legislation, purity language emerges more occasionally, usually quite briefly, but enough to signal its presence as an accepted and expected background language of canonical ordering. In Antioch 1, celebrating Easter with the Jews becomes "the cause of much corruption for many" (πολλοῖς διαφθορᾶς...αἴτιον). Apostolic 8 speaks of the suspicion of clergy not offering the Eucharist sacrifice ὑγιῶς, "healthily" or "soundly". (It is not entirely clear what this means, but we may suspect a purity issue, cf. *Apostolic Constitutions* 2:20, 6:18). Ephesus 7, a doctrinal canon, condemns Nestorius' doctrines as precisely μιαρά, stained or defiled. In the next Ephesian canon, the rights (δίκαια) of every province are to be preserved "pure and inviolate", καθαρὰ καὶ ἀβιάστα. In Sardica 1 a botanical metaphor of a rotting plant is perhaps implied when the custom of episcopal transfer is described as a "corruption that must be uprooted from the foundations" (διαφθορὰ ἐξ αὐτῶν τῶν θεμελίων ἐστὶν ἐκριζωτεά). In the next canon, people are portrayed as "corrupted by rewards and honours" (μισθῷ καὶ τιμήματι διαφθαρέντας). In Carthage 138 Apparius needs to "cleanse" himself from the charges (ἐγκλημάτων καθαρθῆναι), and later in his confession is spoken of "cleansing" his shameful stains (ἐκ τῶν οὕτως ἐπαισχυνταίων σπίλων...καθαρθῆναι) (both times *purgari* in Latin; *Fonti* 2.429-431). In Trullo 1 Macedonius is a βδελυρός, "abhorrent", and the fathers of the fifth council themselves ἐβδελύξαντο, "abhorred", "abominated" the three chapters. The afore-cited Trullo 45 also contains corruption terminology: φθαρτοῦ τε καὶ ῥέοντος κόσμου. Trullo 96 directly commends ornamentation of the self not through cosmetic adornments but "through [moral] cleansing in life" (διὰ τῆς ἐν βίῳ καθάρσεως). In II Nicaea 16 iconoclasm is referred to as a μίασμα, "stain", "defilement" and uses the verb βδελύσσω

to describe the iconoclasts' attitude towards the icons. Similarly, part of the elaborate build-up for canon 22 includes the exhortation for us to purify our minds: λογισμοὺς ὀφείλομεν καθαίρειν.[214]

e. Medicine

The language of medicine, of healing and disease, is most prominent in Gregory of Nyssa's canonical letter and Trullo 102. Both are elaborate treatments of canonical penances as medicines for the soul, a connection already noted in οἱ τοῦ μεγάλου θεοῦ. Together these canons represent the single most elaborate theoretical development of any metaphor in the canons, and may reasonably be regarded as coming as close as anything to providing the canons with a basic framing "theory" of canonical sanctions.

Aside from these canons, however, medical references are never exceptionally common. They occur occasionally. Basil is unusually rich. In canon 1 his definition of "schismatics", as opposed to heretics, involves their having certain ecclesiastical differences that are "healable", ἰάσιμα. In canon 3, a phrase in a general discussion of suitable penalties for clergy reveals that Basil thinks very much in terms of healing: "but in general the truer healing is departing from sin" (καθόλου δὲ ἀληθέστερόν ἐστιν ἴαμα ἡ τῆς ἁμαρτίας ἀναχώρησις). The same term appears in his introduction to canon 90, his letter to his bishops on simony: his letter is to be received by the guilty "as a cure", ὡς ἴαμα. The introductory line of Basil 29 is dominated by θεραπεία language: rulers who swear to harm their subjects πάνυ θεραπεύεσθαι προσῆκε. θεραπεία δὲ τούτων διττή... The same language appears in canon 38, as Basil asserts that, if a girl who has gone after a man without her parents' permission, is reconciled to them, as so "it seems that what happened has received healing" (δοκεῖ θεραπείαν λαμβάνειν τὸ γεγονός). A little differently, in Basil 27, as we have seen, his rational for his prescribed suspension of clerical functions is articulated with a medical metaphor: their τραύματα, wounds, prevent the priests in question from exercising their function. They must rather attend, τημελεῖν, to their own wounds.

Such language may also be found elsewhere. Antioch 5, unlike its doublet, Apostolic 31, contains a brief phrase in which it notes that a recalcitrant priest, having being summoned numerous times, is now to be deposed completely as having "no further remedy" (καὶ μηκέτι θεραπείας τυγχάνειν). Ephesus 8 contains a more extended (psychological) medical metaphor, speaking of passions, healing, harm: "the common

[214] Reading with *Fonti*, against *Kormchaya* and *RP*, καθαίρειν instead of καθαιρεῖν.

passions require greater healing as causing greater harm" (τὰ κοινὰ παθὴ μείζονος δεῖται τῆς θεραπείας ὡς καὶ μείζονα τὴν βλάβην φέροντα). In Trullo 1 the faith is to remain ἀπαράτρωτον, without "wound". In Trullo 2, as already noted, the canons are written πρὸς ψυχῶν θεραπείαν καὶ ἰατρείαν παθῶν. The same canon ends by casting its own penalties as "healing: "...being healed by that in which he fell." (δι᾽ αὐτοῦ ἐν ᾧπερ πταίει θεραπευόμενος). Later, in Trullo 41, it is necessary that eremites who leave their cells without permission must be "healed" with fasts and other hardships (νηστείαις καὶ ἑτέραις σκληραγωγίαις...θεραπεύειν). In canon 96 the authors again cast their own penal activity with healing language: "we paternally heal with a fitting penalty"(ἐπιτιμίῳ προσφόρῳ πατρικῶς θεραπεύομεν). Protodeutera 3, one of the last in the corpus, contains a strong example: it condemns heads of monasteries that do not pursue run-away monks and apply the appropriate medical treatments to the sickness (τῇ προσκούσῃ καὶ καταλλήλῳ τοῦ πταίσματος ἰατρείᾳ τὸ νενοσκηὸς ἀνακτᾶσθαι καὶ ἐπιρρωννύειν).

f. The divine presence and the sacred

"The sacred" is present in the canons in a variety of ways. The most profound are the least explicit, and have already been treated: the general scripturalization and traditionalization of canonical discourse. These serve to root canonical legislation, both directly and indirectly, in Christianity's most fundamental referents for sacrality and holiness: Scripture, the Apostles, "the fathers" and the "sacred tradition". The canons thus emerge as a quasi-sacred text – which, as we have seen, is how they seem to be treated in their transmission. Also important are the canons' many theological and metaphysical pedagogical glosses, especially those which indicate the canons' salvific function or their capacity to effect spiritual healing – to say nothing of the number of obviously sacral matters, namely doctrine and cult, explicitly treated by the canons.

The canons are also occasionally directly , or almost directly, named as sacred. This is mostly confined to the second-wave, and mostly accomplished with the epithets θείος, ἱερός, ἅγιος, already mentioned. Sometimes it is conveyed in other ways. In Theophilus 14, for example, obeying canonical order is presented as equivalent to drawing near to "the law of God".[215] Similarly, II Nicaea 5 refers to the canonical precepts as *God's* canonical precepts: "...considering mammon of more honour than

[215] Something similar occurs in Basil 20, where church order regulations are assimilated to the "laws of the Lord".

obedience to God and not holding to *his* canonical precepts" (καὶ τῶν κανονικῶν αὐτοῦ διαταξεων μὴ ἀντεχόμενοι"). In II Nicaea 2, the canons are also rolled into the concept of "holy Scripture": "[bishops must diligently read] the sacred canons, the holy Gospel, and the book of the divine Apostle, and all other divine Scripture..."

The most striking presence of the sacred in the canons, however, entails the number of ways in which God himself is seen to intrude into the canonical realm. This is usually subtle, but not always. It often involves invocations of (final) divine judgment as an essential context of penance, or appeals to God as an "audience", as already noted above, or references to God as a participant in church justice and church administration. Often this type of texturing seems very brief and formulaic, but even in such cases its effect is palpable: God is always part of ordering and ruling. We may term this the "eschatological" or "theophanic" discourse of the canons.[216]

Gregory Thaumtourgos' letter, explored above, is the oldest representative, and one of the most dramatic: the wrath of God may itself fall upon the community and the sinners as a result of disciplinary disorder. Canon 7 is particularly interesting, as here a decision on penitential practice is referred to the Holy Spirit. Gregory decides that the wrong-doers in question are to remain outside of even the hearing of the Scriptures "until such time as a common opinion about them is reached by a congregation of the holy and, before them, to the Holy Spirit." (μέχρις ἂν κοινῇ περὶ αὐτῶν τι δόξῃ συνελθοῦσι τοῖς ἁγίοις καὶ πρὸ αὐτῶν τῷ ἁγίῳ πνεύματι). The Holy Spirit – God – is the primary agent in deciding difficult penitential cases. A similar instance may be found in Theophilus 13, which also calls upon God to assist in a decision, although in a more passing manner: Theophilus instructs his bishop, Agathon, to "do what God suggests" (ὅπερ ὁ θεὸς ὑποβάλλοι σοι, τοῦτο ποίησον) in regards to whether or not he should treat a certain case with greater severity. More obliquely, in Laodicea 2, God's beneficent will is to be taken into account when considering the reconciliation of repentant sinners to Eucharistic communion: they are to be received "on account of the pities and goodness of God". Likewise in Carthage 66 a decision has been reached to treat the Donatists leniently after not only considerable conciliar examination of the matter, but also with the Holy Spirit himself "nodding assent" to and "becoming resonant" with the decision (ἐπινεύσαντος καὶ ἐνηχήσαντος τοῦ πνεύματος τοῦ θεοῦ). A

[216] Similar patterns may be found in the secular laws, with God's presence or punishments assumed. See for example *N.* 5.9.ep.; *N.* 7.5.pr., *N.* 137.1. A particularly good example is Justinian's demand that the gospels be placed in courtrooms, with the very explicit assertion that this brings to bear the presence of God into the courtroom, which places the judge himself under judgement – *CJ* 3.1.13.4 and 3.1.14.2. Cf. also the tradition of antique judicial cursing tablets, Humfress 2009,387-390.

revealing reference to eternal punishment may also be found in Carthage 93. In the context of a request to the imperial government that the civil laws against the Donatists be activated, the authors give as a rationale for the request: "...so that at least in this fear [of imperial force] they will cease from creating schisms and the foolishness of heresy – they who have not suffered to be purified and corrected by awareness of eternal chastisement"(*Fonti* 1.2.350.16-20). Schismatics and heretics are expected to be deterred and corrected by the prospect of eschatological punishment; a secular law is required in this case because of the lack of this expected behaviour.

Carthage 138, the final element of the Apiarian dossier, is a small *tour de force* of theophanic judicial stylization. Here God "the just judge" intervenes quite directly and decisively in the Apiarian process. The narration begins by noting that three days into the process "God, the just judge" himself "cut off" (ἔτεμε) the delays of Faustinus and the prevarications of Apiarius. We learn that God himself had revealed, even to the eyes of men, Apiarius' wrongdoing (τοῦ γὰρ θεοῦ ἡμῶν τὴν συνείδησιν αὐτοῦ στενοχωρήσαντος καὶ τὰ ἐν τῇ καρδίᾳ κρυπτά...πᾶσιν ἔτι μὴν τοῖς ἀνθρώποις δημοσιεύσαντος...) Later in the same text, and in a similar vein, in the rebuke to Pope Celestine, the council's position is articulated very much in terms of the Holy Spirit's active participation in church affairs. The Nicene fathers, it is noted, decreed that all matters are to be decided in the place they arise, "for [the canons of Nicaea] did not think that the grace of the Holy Spirit was lacking to each and every area of pastoral care [πρόνοια]" (οὔτε γὰρ μιᾷ καὶ ἑκάστῃ προνοίᾳ ἐλογίσαντο ἐλλείπειν τὴν χάριν τοῦ ἁγίου πνεύματος). Later they express a similar disbelief that anyone could think that God would inspire one man with justice, and yet deny this to a whole synod: "...unless there is someone who will believe that our God is able to inspire any one man or other with the justice of judgment, but deny it to an innumerable number of bishops gathered in synod?" God himself "inspires" church administration and judgments.

Sometimes God can even be involved in quite detailed and even mundane administrative matters. In Apostles 38, for example, the bishop is exhorted to manage financial affairs "as if God is overseeing" (ὡς θεοῦ ἐφορῶντος). Clear guidelines are then given of what God expects, particularly that no appropriation for relatives or personal use are to occur of *his* things: μὴ ἐξεῖναι...ἢ συγγενέσιν ἢ ἰδίοις τὰ τοῦ θεοῦ χαρίζεσθαι. In the canon's Antiochian doublet, Antioch 24, God is again similarly τὸν πάντων ἔφορον καὶ κριτὴν θεόν. In Antioch 21 God appears briefly as an administrative agent, placing clergy in their appropriate churches: clergy are "to remain

in the church which they were allotted *by God* in the beginning". Similarly in Carthage 26, a bishop who has not taken the required steps of consultation before selling church goods is to be held accountable not just to the synod, but also to God: ὑπεύθυνος τῷ θεῷ καὶ τῇ συνόδῳ.

God is particularly concerned about questions of hierarchical order. In Carthage 86 the order of precedence among bishops is formally put in effect with the permission of God: "this order...will be maintained by us by the permission of God" (κατὰ συγχώρησιν θεοῦ). Similarly, in Trullo 64, the clerical order of the church is strongly defended in terms of its origin from God: lay people are to "yield to the order handed down by the Lord" (εἴκειν τῇ παραδοθείσῃ παρὰ τοῦ κυρίου τάξει) for, as we learn, God himself has made the "parts" or orders (διάφορα μέλη πεποίηκεν ὁ θεὸς). Again in II Nicaea 14, which states that only ordained readers should read in church, the scrupulous observance of church hierarchy is asserted to be "well-pleasing to God" (θεῷ εὐάρεστόν ἐστιν).

Further examples of such "theophanic" stylizations may be found in Appendix C (19)

3. The legal whole revisited

With these examples of the "extraneous" elements of canonical discourse reintroduced into the legal equation – the flesh put back on the bones – the overall complexion of the canonical rules changes considerably, and a much more satisfying picture of the "legal whole" begins to emerge. The rules no longer appear as merely a set of technical and pure regulations, but now are manifest as a much richer legal phenomenon, still conveying basic rule content, but in a manner that is revealing of a concept of law and legality that is quite complex – and once again rather foreign to modern sensibilities.

Each of the discourses noted above is perhaps best understood as conveying a "message" about the nature of canonical law and legality.

The message of the discourse of tradition is simple: canonical legislation is very much about relaying and engaging with tradition, and the chief referents for this tradition are Scripture, other canons and other traditional ecclesial customs and usages. Legislative work is very much a respectful, ongoing conversation with the past, mostly derivative and confirmatory in character.

The message of the discourse of pedagogy is also simple: law must speak directly to moral and metaphysical realities, and it must be kept embedded in these

realities. The law is thus both pedagogical in its own action, and it presume pedagogy: the law itself teaches, and it requires that its subjects be formed in specific cultural value narratives. These last include specific concepts of morality, theology, honour, law-as-medicine, purity, and a strong conviction in the ongoing action of God in the disciplinary world of the community. This discourse is perhaps particularly disconcerting for modern legal sensibilities – it seems especially "extraneous" to the "real" rule content – precisely because this intentional embedding blatantly contradicts the fundamental instinct of much modern positivism-formalism, the strict autonomy of legal discourse from "outside" value systems. In this regard, some of the most extreme examples of this type of canonical styling, such as Trullo 96 cited above, are exceptionally instructive. The degree to which they strike us as odd – even ridiculous – is the measure of how distant our own legal presuppositions are from those of these texts, and of this entire world.

The message of the dramatic discourse of persuading and dissuading is similar to that of the discourse of pedagogy: canonical normativity is to be embedded solidly in the realm of moral imperative. Obeying or disobeying the canons is not simply a neutral question of following or not following a set of minimal rules. It instead involves questions of one's very character and thus demands conformance to a very broad set of narratives of correct behaviour and dispositions. In effect, the canons co-opt broader forms of social control (morality, shame, fear) for their own uses, both instilling certain dispositions, and demanding certain dispositions. Yet again the instinct is almost opposite that of modern positivism/formalism, which seeks to distinguish the moral and legal, or the "internal forum" and the "external forum": the canons quite intentionally weave them together. In effect, the law makes constant claims on conscience, and is not at all shy about addressing – and making demands on – the hearts and emotions of its subjects.

The bottom line of all these discourses is that to "get" canon law, and to "do" canon law, you must "get" and "do" broader narratives of the just and the right. These include knowing the right traditional referents or fundamental con-texts, learning the right ideas, and cultivating the right behaviours and dispositions. Critically, however, this now emerges not simply as a theory or idea articulated *about* the tradition, as in the prologues. Now it emerges as part of the very fabric of the laws themselves. The canons are written almost as expressions or manifestations of these other narratives, and are quite inseparable from them, because to be a "legal" text they *must* be connected

with the past, with justice, morality, the Holy Spirit, Scripture etc. Normativity is essentially, primarily and actively about remaining embedded in these narratives. The overall picture – the legal whole – is thus not one of a bare system of instrumental rules dominated by a technical proprietary discourse of rule-logic, and closed-off from other narratives of theology, values and morals, only touching them now and then, and in a controlled manner. Instead, the rules are clearly written for a conceptualization of legal process in which the rules are always being read and applied in a much more free-form and constant negotiation with many other external narratives. The more technical legal discourse discussed above, with its logical rule-finding and conceptual formalism, still exists in this world, but as *part* of this world. It is only one aspect of legal practice that one must get right. It is thus not so much the controlling framework for the laws' operation – as we would expect – as much as one tool among others in the realization of justice.

F. Summary and analysis: the language of the canons

A survey of canonical nomenclature reveals one vital fact: the Byzantine canonical tradition does consciously conceive of itself as a collection of rules which possess their own name. The presence of this proprietary and even technical nomenclature strongly suggests a self-conscious sense of the canons' own autonomy as a rule-world. There can be little doubt that the canons were thus consciously conceived as a particular and proprietary body of rules: Fögen is quite correct to note that Byzantium knew two basic *Rechtsmassen*, the νόμοι and the κανόνες. This corresponds to the reality of the manuscripts, and aspects of the prologues.

Even vis-à-vis the νόμοι, however, this autonomy is never particularly doctrinal in character, or absolute. The distinction in nomenclature, for example, is susceptible to exceptions, which should caution us from assigning it too much ontological significance in revealing the essence of Byzantine canonical normativity. Closer examinations of the broader textures of the canons – genre, patterns of dispositives, rule-structures, technical language – also reveal shifting patterns of assimilation and distinction that elude any overly-neat conceptual distinction between νόμοι and κανόνες. The canons never emerge as radically different or discontinuous from the norms of secular legal-writing, nor do they emerge as truly imitative. A constant pattern of similar-yet-different emerges in a negotiation of identity that seems primarily literary, not legal-doctrinal, in character. The result, not surprising, is very similar to what we have seen in the

manuscripts and implied in the prologues: the two types of norms seem to share the same general normative "space", and to participate in the same general world of normative expression, but neither is exactly a mirror of the other.

The self-conscious terminological autonomy of the Byzantine canonical tradition also does not translate directly into a broader modern-like legal positivism-formalism, either as something the canons are seeking to avoid by calling themselves κανόνες or as something the canons are beginning to manifest by calling themselves κανόνες. (The term κανών is in any case exceedingly broad in scope, fairly generic and with many uses, and probably should not be read as having any deep doctrinal significance in itself.) Indeed, an examination of the broader textures of the canonical texts makes it clear that one of the core concepts of modern positivism-formalism – namely the conceptualization of the legal system as a body of internally coherent rules that operates as autonomously as possible from external narratives of morality and values – is precisely and directly negated. As we might now expect from the broader shape of the tradition and the prologues, the canons are instead constantly reaching outside of themselves in a very messy process of embedding themselves into broader value narratives. Whereas the shape of the tradition and the prologues only suggest this activity, however, the canons can now be seen to be realizing it. The prologues thus, for example, say the canons should teach and tap into broader metaphysical narratives, and the canons *do* teach and tap into broader narratives; they canons are supposed to be about "life", morality and spiritual psychological, and they do speak directly to life, morality and spiritual psychology; canonical activity is supposed to be traditional in orientation, and indeed the canons are; and so on. The canons are thus only in part written as constituting a technical-doctrinal framework. Equally important are these other tasks which by turns instill and assume a huge network of scriptural, moral, and metaphysical values as integral parts of Byzantine canon-legal reality. Thus while even the most positivist-formalist legal theory (e.g. Kelsen's "pure law") must ultimately assume some type of contact with a value network, in the canons this network is very near the surface, and is regularly, and apparently quite happily, "breaking into" the rule world. The canons are very directly and consciously being written into, and held into, this network. Consequently, the textual and terminlogical autonomy of the canonical rules does not translate into a *doctrinal-theoretical* rule autonomy. Byzantine canon law is a formal and distinct rule-world, but it is not a closed rule-world.

This self-understanding is also signaled by the lack of any consistent sense of the Byzantine canonical tradition as "canon law". The Byzantine canonical tradition seems to think of itself as a distinct rule-world, and yet not abstractly. One aspect of this is the casuistic and surprisingly "concrete" nature of the canons, with their lack of systematic interest in juridical abstraction, as well as the general formation of the tradition as an agglutinating accumulation of very heterogeneous traditions which tend to be preserved in their original form. The tradition thus does not tend to think of itself primarily as an ongoing and autonomous discipline or field, or an abstract aggregate of principles, techniques and "sources" constituting a constructive jurisprudence, or even as a present legislator's project, but as a set of heterogeneous rules, "law sayings", deeply embedded in broader sets of principles and narratives, and thoroughly traditional in character. This last is particularly critical: legal authority is always vested in older semi-sacred traditions, and therefore the legal system *per* se is never a present abstract reality constructed *out of* the past, but always a collection of the past authorities themselves. If it is a real law, it is a concrete, traditional text. As such, "canon law" *is* "the canons". Inasmuch as there is a broader concept of "the church's law", it must be nothing other than the aggregate of the broad Christian regulative "stories" of justice, moral progress, divine instructions, repentance and eternal judgment – of which the canons are a part.

CHAPTER 4. SYSTEMATIZING THE LAW: THE 6th C THEMATIC COLLECTIONS

In the previous chapter we explored how the canons themselves read as legal texts. In this chapter we turn to the thematic indices of the *Coll50* and *Coll14* as two critical moments in which these same canons are being read, shaped and generally "digested" by and within the early tradition itself. In particular, these indices represent the first – and ultimately definitive[1] – attempts at classifying the Byzantine corpus material and organizing it into a shape and structure beyond that of the straight corpus collection. They therefore provide an invaluable window onto a range of issues associated with the nature of Byzantine canonical "systematization": how and to what extent the texts could be shaped into a new whole, what shape this whole could assume, how the canonical "parts" could be related to one and other in this whole, and how the individual texts could be manipulated, interpreted and transformed in these processes. They are thus primary witnesses to how canonical texts could be handled by jurisprudential processes and the extent to which Byzantine canon law could be consciously conceived as a legal "system" at all.[2]

A. Origin and dating

Thematic or systematic collections (I use the two terms synonymously) may be defined as any canonical collection which contains a set of topical titles or headings under which relevant canons are subsumed, either cited in full, in part, or as simple canonical references (e.g. "Nicaea 10", "Ancyra 4"). These type of texts emerge with any clarity in both Greek east and Latin west only in the 6th C. The first such collection, however, mostly unrecognized in the survey literature, seems to be Syrian:

[1] In our period the *Coll50* and *Coll14* thematic schemata have no competition whatsoever. See Appendix D (1) for further details.

[2] This last is a critical question in light of the almost automatic assumption in much modern, especially civilian, legal thinking that legal phenomena should constitute internally coherent juristic and legislative wholes. See Berman 1983,7-10; Glenn 2007; Merryman 1969,65-70; 13-15; Weber 1925. For broader historical context, see Kelly 1970, and any narrative of post-16th C European legal history (Kelly 1992, Robinson et al. 2000, Wieacker 1952). The methods, techniques and, especially, implications of canonical systematization in our period have not, however, been investigated in much depth. The most useful study is Pinedo 1963, but see also Gaudemet 1991 and Mordek 1975. Sohm's (in)famous study of Gratian's order (Sohm 1918,19-61, 1923,79-85) may also be mentioned, as he saw it as a last gasp of the *altkatholische* mentality; see Chodorow 1972,10-16 (and Congar 1973) for further references on its later reception (mostly rejection). Secular legal systematization and codification in our period, and earlier antiquity, is better treated, including Burgmann 2002; Diamond 1950; Frier 1985,158-171; Gagarin 2000 (and Lévy 2000); Gaudemet 1986; Harries 1998; Heszer 1998; Honoré 1978; Jones 1956,292-294; Matthews 2000; Schulz 1953; Stolte 2003; and, in part, Weber 1925. Works on general Byzantine processes of compilation and collection are also useful, including Lemerle 1971 and Odorico 1990.

the *Collection in 51 Titloi*.[3] Although only first attested in a 7th C manuscript (London BL syr. 14526), its titles contain only references to the canons through to Constantinople, despite being found in manuscripts that contain later material. As such, as Schwartz suggests, it may well be pre-Chalcedonian (451).[4] According to Schwartz it is a translation of a Greek original, but is unrelated to the *Coll50*.[5] Possible relationships with other later systematic collections have not been explored.

In the west, the first thematic collection is usually recognized as the handbook-like *Breviatio canonum* of Fulgentius Ferrandus, dated c. 535-546.[6] It is followed by the equally handbook-like *Capitula* of Martin of Braga, c. 563-580, as well as the much more complete *Concordia canonum* of Cresconius, perhaps dating to the mid-6th C.[7] Other prominent early Latin thematic collections include the 7th C systematic recensions of the *Hispana*, the 7th C *Vetus Gallica*, and the early 8th C *Hibernensis*. This genre will slowly gain ground in the west, becoming virtually the norm for collections after the 9th C, ultimately culminating in the very sophisticated *Concordia* of Gratian.

The Byzantine canonical tradition of the first millennium will only ever know three systematic collections, all of which are thought to have originated in the 6th C. Only the *Coll50* and *Coll14* are extant. One other collection, the *Coll60*, is known from a brief description in the forward to the collections in 50 titles.[8] The *Coll50* and *Coll14* traditions, particularly the latter, each undergo numerous expansions and re-workings in the following centuries, but later recensions do not seem to have significantly modified the original thematic titles themselves; their number and content remain fairly stable throughout the tradition, with or without nomocanonical insertions.[9]

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[3] Ed. Schulthess 1908,17-27. Unfortunately, no translation of this collection has been made, and I rely upon descriptions by Schwartz 1910,200-201, 218 n.2 and a few notes of Schulthess 1908,viii-xi and Selb 1989,95, 100-101, 133, 143. It is to be distinguished from the *capitulatio* of London BL Syr. 15428, which seems to be similar in form (and content?) to that proceeding Dionysius II.

[4] Schwartz 1910,200-201.

[5] Schwartz 1910,200 n.2; cf. *Sin* 10-12

[6] On the following collections generally see Maassen 1871 and, more briefly, but up to date, Zechiel-Eckes 1992, Fransen 1973, Gaudemet 1985 and Mordek 1975. Occasionally another small collection, the so-called *Statuta ecclesiae antiqua* (5th C; ed. Munier 1963), is treated as the first western "systematic" collection (e.g. Gaudemet 1991,167; Mordek 1991,901; Zechiel-Eckes 1992,1.31). However, this collection lacks a title-rubric structure, and is best regarded as a rather ordinary example of Apostolic Church order material that has implicit topical themes – and as such is no more "systematic" than most other examples of Apostolic Church order literature (e.g. the Didache). On this collection, see Munier 1960, Gaudemet 1985,84-86.

[7] The date and place of origin of Cresconius' *Concordia* is controversial; see Gaudemet 1985,138-139; Reynolds 1986,400; Zechiel-Eckes 1992,1.66-118.

[8] *Syn* 5. From the very general criticisms of Scholastikos it does not seem possible to reconstruct the precise form of the *Coll60*; see Beneshevich's comments, *Sin* 219.

[9] The matter has not yet been thoroughly examined, but in the editions of *Kormchaya* and Meliara 1905-1906 (both pre-Photian recensions) no chapter clearly owes its existence to a post-6th C addition. *Pitra* and

Only two dates are reasonably secure for the Greek collections. First, the first version of the *Coll50*, fairly consistently ascribed to John Scholastikos in the manuscripts, must have been composed sometime during his lifetime, i.e from c. 525-530 to 577.[10] Second, the first nomocanonical reworking of the *Coll14* is very likely to be located between 612-629, perhaps 612-619, as all manuscripts contain a law of Heraclius of 612, but an important law of 629 is quite obviously a later addition in some manuscripts, and another law of 619 is missing altogether.[11]

Aside from these ranges, dating is more speculative, and tends to become quite dependent upon the (somewhat hypothetical) connection of the various collections to civil law appendices. Scholars tend to assume, however, with Zachariä von Lingenthal, that the *Coll60* titles was unlikely to have been written before the completion of Justinian's civil codification in 534, and thus place it around 535.[12] If this is correct, it may vie with Fulgentius as the first thematic collection in the Greco-Latin world. This dating can be lent precision if the *Coll60* included the *Coll25* as an appendix, as the original form of the *Coll25* seems to have lacked any legislation post-534.[13]

John Scholastikos' collection is often placed after his ordination as a presbyter c. 550, at any rate before his tenure as patriarch of Constantinople (from 565-577), and possibly while still in Antioch.[14] In support of these assertions one manuscript, now lost, may be cited which attributes the collection to "the presbyter John".[15] Further, the *Coll87*, if originally the appendix to the *Coll50*, and composed at very near the same time, seems to lack any material after 546 – in particular, Novel 129, of 551, which touches on church matters.[16] Finally, the *Coll87* omits various regulations relating only to Constantinople – thus supporting an Antiochian provenance.[17]

RP, however, both include a latter addition 13.41, a chapter derived exclusively from a post-6th C addition (Trullo 64). Title 14 also tends to gain some extra miscellaneous chapters in the manuscripts, as reported by *Pitra* 2.636, and evident in MSS of the 11th C recensions (e.g. in Jerusalem Pan Taph. 24 and Athos Pant. 234; cf. Schminck 1998); so also in the older Paris gr supp. 614, 10th C. The *Nachleben* of these chapters is, however, unclear; apparently they are not regular in the commentator recensions. In at least one instance Title 14 also seems to disappear (Vienna hist. gr. 70); this too is not well studied.

[10] On Scholastikos' birth date, see *Sin* 273-274

[11] The likely authorship of "Enantiophanes" also confirms this general period; for more detail on both matters see *Delineatio* 66-67.

[12] So, especially, *Delineatio* 52; cf. Zachariä von Lingenthal 1877,615-616. *Peges* 132 places it at 535-545.

[13] Thus *Delineatio* 52.

[14] For example, Beck 1977,144; *Delineatio* 52-53; *Historike* 44-45; Hongmann 1961,53; L'Huillier 1976,55; *Peges* 132-133; Schwartz 1933,4; Zachariä von Lingenthal 1877,618. To my knowledge, however, the matter has not been thoroughly re-examined in the 20th C.

[15] The so-called "Claromontensis", known now only through Voellus and Justel 1661 and two early catalogue descriptions. See *Sin* 196-198; cf. Zachariä von Lingenthal 1877,618.

[16] *Sin* 288-289.

[17] *Sbornik* 205 n. 2.

Ernst Honigmann's ingenious proposal – the details of which we cannot repeat in full – that the first *Coll14* was produced by Patriarch Eutychius and the monk John (later John IV "The Faster" of Constantinople) is widely regarded as reasonable, if not provable, and has tended to fix a date of this collection at c. 580.[18] Suffice to say that if the references in τὰ μὲν σώματα to a predecessor do refer to the *Coll50*, then at least it was produced after the *Coll50*, and presumably after the death of Scholastikos (the then-standing patriarch). Further, if the *Tripartita* is the secular collection referred to in τὰ μὲν σώματα – which seems very likely, as no other such collection comes even close to fitting its description – then the date of 580 is certainly possible, as the latest piece of legislation in the *Tripartita* dates to 572.

The relatively synchronous appearance of many of these collections in both east and west in or around the 6th C suggests a certain coherence, and even connection, between these collections – a kind of systematic "movement". There is no concrete evidence to suggest an official or even conscious project *per se*, but if one maps the pre-7th C collections they do read as a surprisingly coherent imperial Mediterranean phenomenon, as all but one of these collections, the *Capitula* of Martin, are written in imperial territories (Ferrandus and Cresconius, of course, writing in the newly re-conquered African provinces – or for the latter, perhaps Italy). Even Martin of Braga spent time in the eastern empire, and became a monk in the Holy Land; he is very much of the empire, and his work is directed towards making better known the imperial (Greek) corpus to a western audience.[19] The Syrian *Titloi*, although earlier, are also almost certainly from the empire. The systematic indices are thus best thought of as, at first, a general imperial phenomenon, stretching west-east across the Mediterranean region. Only later do they extend beyond the imperial borders.

These collections are also all very similar in both form and content. All are built around the same core (Greek) corpus of canons, and all are more or less the same "type" of thematic index: simple rubrical headings that summarize canonical content. More specifically, although Ferrandus and Braga are clearly meant to be small practical handbooks, and in their size and level of selection, have no 6th C eastern counterparts, Cresconius' *Concordia*, the most advanced and complete of the early western thematic collections, is – as we will see – an almost exact morphological twin of the *Coll50*. Further, its treats its source (the Dionysian II corpus) in almost exactly the same way as

[18] Honigmann 1961,55-64; so *Delineatio* 60-61; *Historike* 68-71; *Peges* 134-135; Stolte 1998a; van der Wal and Stolte 1994,xx-xxi.
[19] Preface in Somerville and Brasington 1998,53-54 (trans.).

the *Coll50* treats its corpus: absolutely comprehensively – it only omits some canons from Carthage, as often the case at this period.[20] If the mid-6th C date for this collection is correct, it is also approximately contemporary with the *Coll50*. The systematic elements of the 7th C *Hispana* (in their various forms) are likewise morphologically very similar to the *Coll14*: a thematic index comprised of a series of books divided into chapters, and the whole tending to preface a straight corpus collection – and apparently including most of the material of the *Hispana*.[21]

Despite, then, the tendency to treat the emergence of the thematic collections in east and west as two isolated if parallel events, the collections instead suggest a certain legal-cultural unity, and are another indication of a common imperial canon-legal world running east-west across the Mediterranean through at least the 6th C: it is centered on the same corpus, and tends towards the same forms.

The reasons for the appearance of these thematic versions of the corpus are not entirely clear. The usual explanation is two-fold: an internal pressure was generated within the tradition itself by the increasing unwieldiness of the growing canonical corpus, and the Justinianic codification (528-534) provided an impetus for a parallel ecclesial development.[22] Neither explanation is entirely satisfying.

Leaping to the idea that the corpus naturally evolves into a thematic form because of the latter's natural convenience and sophistication is perhaps a retrojection of the later trajectory of the western medieval experience.[23] The growing size of the material, in particular, cannot be understood as a certain cause. It is true that the addition of Basil in the *Coll50*, and of Carthage and the patristic material in the *Col14*, or Carthage and papal material in Dionysius, did considerably increase the size of the various corpora. It is also true that the prefaces do imply that the variety and quantity of the material corpus was a primary motivation for their work (see below). But this last may be more of a topos of authorial justification, and as for the former, the additions to the 6th C corpora are hardly overwhelming – not enough to credibly strain a pre-modern memory. Certainly the full corpus of the 6th C *Coll14* is minuscule in comparison to the quantities of secular legal material that are much more convincingly put forward as factors in the initiation of Justinian's (and earlier) secular codification project. Further, the Syrian *Titloi* were clearly formulated before considerable corpus expansions. In this

[20] On its contents and sources, Zechiel-Eckes 1992,1.5-28; the decretals may also be considered as somewhat selected.
[21] See Díez 1982,2.1 and 2.2; this parallel is especially close with the *Tabulae*.
[22] For example, *Peges* 131; Pieler 1997a,579-580; van der Wiel 1991,42.
[23] See chapter 1.C.1.

light, a systematic indexing of the corpus suggests more convenience than necessity, and even suggests a certain artificiality. A more ideological explanation may be preferable.

The idea that Justinian's codification may have inspired the ecclesial development is an obvious one, and most scholars take it for granted.[24] It is especially compelling if the Syrian collection is ignored, and the *terminus post quem* of the *Coll60* (and perhaps Ferrandus) is set at 534. Certainly the form of the systematic collections – divided into books and/or titloi and chapters – is highly reminiscent of the *CJ* and the *Digest*.

Here too, however, we should be cautious. There is no direct evidence that Justinian's codificatory work provoked the systematic recensions. The authors of the new collections do not explicitly cast themselves as working on the model of this emperor's work, or secular legal works at all, and as far as I am aware, there are no references in the 6th C literature to such an ecclesial "program".[25] In fact, there are almost no references in our period to the collections as "systematic" collections at all, or even as "the canons in [x] titles"; overwhelmingly the canonical collections are always simply "books of canons" or "the canons".[26] There is very little explicit consciousness of systematization at all.[27]

Further, strictly speaking, there is no hard and fast reason why the systematic canonical collections could not have emerged before Justinian. Here we must be careful about a potential circularity in dating the collections in *Coll60* and Ferrandus to after 534 on the grounds that they "must" have been inspired by Justinian – and then bringing them forth as evidence of a sudden post-Justinianc boom in thematic collections. The Syrian *Titloi* are apparently pre-Justinianic, and the *Coll60* and the *Breviatio* could be too. In this connection one disturbing aspect of the transmission of the *Coll50* is worth noting: the collection is not uniformly ascribed to John Scholastikos. In a few

[24] For example, *Historike* 38; L'Huillier 1976,55; 1997,141; *Peges* 131; Pieler 1991,604 n. 18; Schwartz 1910,195, 1936a,160.
[25] A possible, and indirect, exception is the occasionally remarked (e.g. *Historike* 46) parallel of the fifty titles of the *Coll50* and the fifty books of the *Digest*. However, fifty, half a century, is also simply a very convenient and round number.
[26] An exception may be a 9th C letter of Pope Nicholas to Photius (Mansi XV 176.263) which mentions the "quinquaginta titulos"; *Sin* 326. See chapter 1.B.
[27] This finds a certain parallel in the oft-remarked lack of interest of contemporary sources in the Justinianic codification; see Pieler 1978,402-403, nn. 13, 14, with further references, and Laiou 1994b for similar patterns in later Byzantine sources.

manuscripts the collection is ascribed to Theodoret of Cyrus (393-457).[28] The text's editor, Beneshevich, dismissed this tradition on the basis of the much broader tendency of ascribing the text to John, including in the oldest manuscripts, and the lack of awareness of this "collection of Theodoret" in the Oriental churches.[29] But even Beneshevich admits that it is difficult to determine why Theodoret's name would ever have entered the tradition.[30] It does seem odd that anyone in the 6th C or later would have mistakenly or intentionally ascribed anything to Theodoret following the Three Chapters – much less something that was intended to have authority.[31] However, it would be very easy to imagine that Theodoret – in the vicinity of Antioch, which was already associated with church-legal activity, and also near Berytos – may have composed such a collection well before 534. Could not John Scholastikos, who was from Antioch, have brought this text with him to Constantinople, perhaps modifying it, or perhaps just attaching his name to it or a later recension (perhaps when the *Coll87* was added)?

Perhaps more importantly, there is nothing in the basic technique of the ecclesial systematic collections that demands Justinian's codification as a precedent. The very basic type of topical organization of the canonical collections is easily evident in the 5th *CTh* (books and titles), for example, and elsewhere in even earlier legal literature.[32] Further, it is not entirely clear that a legal precedent of any sort is necessary. Although it is probably correct to view the systematic "movement" as one way in which the canonical tradition broadly assimilated itself to Roman legal literature, other types of literature also evince basic rubric-reference organizing structures. Schwartz, for example, saw Basil's *Moralia* as the most obvious model for the Syrian *Titloi*, and τίτλοι listings may be found in 5th C biblical manuscripts (the term is not exclusively legal).[33] If anyone had cared to thematize the canonical material before the 6th C, ample models, from a variety of different sources, were available.

It is probably unnecessary therefore to imagine any particularly pressing need, cause or inspiration for the thematic indices. They are best thought of as what they

[28] London BL Add. 28822; Venice Nan. 226; Paris gr. 1370; Torino BN 170 (see *Sin* 269). Cf. *Historike* 38, n.5 for the theory of Jean Doujat (d. 1688) regarding Theodoret's authorship of the *Coll60*.
[29] *Sin* 269-270, 322.
[30] *Sin* 269.
[31] *Clavis* notes only three works that seem spuriously attributed to Theodoret: 6286-6288.
[32] Almost all the source surveys discuss this material; see e.g. Pieler 1997a,566-567, 573-579; Schulz 1953; Wenger 1953,530-561; cf. also Honoré 1978,139.
[33] Schwartz 1910,200 n.2; Goswell 2009; see Pinedo 1963,289. n. 18 for parallels in various other patristic and even Masoretic practices.

most obviously present to be: works of convenience, bringing greater order to the church's canonical tradition, and broadly resonant with a variety of contemporary late antique organizing and structuring techniques, legal and otherwise.

B. Self-presentation

How do the collections talk about their own systematizing work? All three authors of the prefaces to the *Coll50* and the *Coll14* provide some description of their method of systematization and organization. These technical descriptions, inevitably in the latter part of the prefaces, seem to constitute a conventional part of Byzantine canonical introduction, and may also be found in a number of the secular prefaces.[34] These passages are exceptionally valuable as they are the only texts in which Byzantine systematizers directly reflect on the technical aspects of their task. In effect, they are the only sources for how the Byzantines themselves may be found defining and talking about their own canonical τεχνή.

The texts are above all characterized by brevity and simplicity. Indeed, they verge on statements of the obvious, and their most striking feature is not what is present but what is not: they engage in virtually no sophisticated jurisprudential analysis, neither discussing contradictions, repetitions, or obscurities, or means or principles for treating these matters. Instead, they convey a simple method of compilation and organization oriented above all at the facilitation of convenient and thorough engagement with the canonical sources.

The main notes are sounded by John Scholastikos. The canonical legislation of the church, he explains, has been issued in a variety of different places, for different reasons, at different times. As such, it lacks "organization by subject matter" (τάξις πραγμάτων), and it is thus difficult to discover all that the canons say on any given topic.[35] His task, therefore, is to gather the material into one and divide it into titles in which the similar are placed next to the similar[36]. His goal is thus explicitly quite simple: to make the "finding" (εὕρεσις) of that which is sought easy (ῥᾳδία) and toil-free (ἄπονος). These points are enforced by criticism of the previous *Coll60*, which made it difficult to find all that has been set forth on any one topic – in his collection, he

[34] For example, *De Auctore* 6-9; *Tanta* 2-8; Prooimion to the *Eisagoge* 84-113; Prooimion to the *Prochiron* 42-83.
[35] *Syn* 4-5.
[36] *Syn* 5.

notes, each title will clearly indicates the content of that which it encompasses.[37] His table of contents, he notes, also makes it easy to identify the taxis of the canons: λίαν εὐσύνοπτος.[38]

The first prologue to the *Coll14*, τὰ μὲν σώματα, likewise speaks of gathering the canons of the synods which took places at "various" (διάφορος) times into one place – but in so doing being careful to preserve the name of each council.[39] Having gathered "everything", the author continues, one "brings together" the δύναμις of the material into titles, and divides them into chapters under which one places the references to the appropriate canons.[40] These references include source name and number. The whole produces – "as I think" – a "σύνταγμα εὐσύνοπτον".[41] Criticism of predecessors is also engaged in; in particular, as already noted, the author criticizes the tendency of placing the full text under the titles as producing an unwieldy collection, and, in particular, of leading to the undesirable division of canons – accusation of which he wishes to avoid.

He concludes by briefly describing how and from which sources he includes political legislation, "in short and summary". His exposition of this material is "brief", in a collection, as both an aide-memoire and for the "perfect research" of the readers: σύντομον ἐν συναγωγῇ ποιησάμενος ἔκθεσιν, ἅμα μὲν εἰς ἀνάμνησιν, ἅμα δὲ πρὸς τελείαν αὐτῶν τοῖς ἐντυγχάνουσιν ἔρευναν.

The second prologue to the *Coll14*, generally attributed to Photius, or at least to the redaction of the 14 Title tradition made during his patriarchal tenure, follows a similar pattern. The author notes that during the interval since the appearance of the first version, new synods of arisen to address "not a few" new issues, of various (διάφορος) causes.[42] He has thus added new material, but has been careful to preserve the "chain" (εἰρμός) and order of composition of the older collection. This last he describes as "that which our predecessors ἐφιλοτεχνήσαντο" – a rare use of "techne".

The overall picture is thus quite simple, and quite coherent. Taken together, the three prologues may be understood to constitute the basic Byzantine self-conception of canon-legal systematic *techne*. It is composed of four conventional elements, each conveyed with similar terminology. A 1) varied source material (διαφορ-) is 2) gathered

[37] Exactly what was wrong with the *Coll60* is, however, difficult to discern from Scholastikos' description.
[38] *Syn* 5.
[39] *Pitra* 2.445.16-17
[40] *Pitra* 2.447.41-44
[41] *Pitra* 2.447.44
[42] *Pitra* 2.448.8-9.

into one (συναγογ-; συλλογ-; συνταγ-; αἰθρο-; συναιρ-; [συν][προσ]αρμοζ-; συμφλεκ-) and 3) divided (διαιρ-) into titles or chapters (or both) which allows for 4) a clearer and more convenient "discovery" of what one is seeking: not δυσευρετ-, δυσποριστ- or δυσαλωτ- to find (εὕρ-) but ῥᾳδ- and ἀπον-, ἀκοπ-, and always with the result of σαφ- and εὐσυνοπτ-. The *Coll14* preface supplements these terms with memory (μνημ-) vocabulary: the fathers and secular legal legislation are provided as *aide-mémoires*.

The extreme simplicity of this "systematic" prescription is important. The Byzantine self-presentation of canonical systematization is one of a very simple, literal model of "law finding". Systematization facilitates quite literally the "finding" of and engagement with traditional legal texts. To systematize law is to engage in a straightforward categorization of traditional material by which one is brought into closer contact with the original texts. Issues of contradictions, distinctions, underlying concepts, or material coherence are not prominent: the notion of the law being "varied" does not seem to imply an idea of contradiction, nor does the ἁρμοζ- or εὐσυνοπτ- vocabulary implies any type of interpretative reconciliation. It instead seems directed towards coherence of topical classification. There is, indeed, no sense that systematization in any way implies material reshaping of the corpus itself. The real concern of the systematizer is simply 1) to identify the correct traditional material, and then 2) to place it in thematic categories. It is a process of topical indexing.

C. Morphology

The self-presentation of the systematic elements of these collections as simple topical indices is true to form. The thematic index, essentially a preface to the corpus, may be regarded as little other than a glorified table of contents to the corpus. Indeed, in terms of genre, tables of contents are probably the most obvious predecessor for these collections. Both are constituted by a brief set of rubrics, summarizing the contents of their referent, and are often in the form (Περὶ... Ὅτι... De..). The difference is simply that the rubrics of the thematic indices subsume a number of specific referents, and that the rubrics do not (generally) follow the work's order of chapters, but instead follow their own thematic ordering.

The basic morphology of all early systematic collections, Latin and Greek, may thus be schematized as follows:

PROLOGUE + LIST OF SOURCES (perhaps as part of the prologue) + SYSTEMATIC INDEX + CORPUS

There are a few main variations among the collections. First, the systematic indices may be either one-tiered or two-(or more)tiered. In the former, there is only one level of rubrics in the index (as Cresconius, or, superficially, the *Coll50*); in the latter, there are two, with sets of primary rubrics gathered under larger thematic groups by secondary rubrics (as in the *Coll14* or the systematic *Hispana*, where the chapters are subsumed under broader "books" or titles). Second, as already noted, the corpus portion of the collections may be arranged either systematically or non-systematically. In the former, the systematic index is simply repeated with the subsumed canons under each rubric written out in full. In the latter, the index is left as an index.

We may thus indicate a more comprehensive schema:

PROLOGUE + LIST OF SOURCES + SYSTEMATIC INDEX (one or two-tiered) + CORPUS (systematically arranged or non-systematically arranged)

The *Coll50* is formally a one-tiered systematic collection, and generally found with a systematic corpus:

PROLOGUE + LIST OF SOURCES + ONE-TIERED SYSTEMATIC INDEX + ONE-TIERED SYSTEMATIC CORPUS.

It sometimes, understandably, lacks the initial systematic index.[43] Its corpus, as noted in chapter one, while originally systematic in form, also often has appended to it later sources listed chronologically. Cresconius, which has a very similar corpus, is very similar in form. It too has a prologue, a one-tiered index, and a one-tiered corpus in systematic in form. Cresconius may however be regarded as more conservative or "primitive" in that his system of rubrics is one step closer to a simple table of contents: his rubrics, mostly derived from Dionysius, actually follow the Dionysian corpus successively (e.g. Titles 1-50 start each with canons from the Apostles; 76-80 from Nicaea; 81-106 from Ancyra; 108-120 from Neoceasarea, and so on).[44] As a result, very few titles actually function as real thematic groupings.[45] Further, Cresconius' rubrics are true one-tier rubrics. The *Coll50* titles in fact usually contain more than one rubric, and are thus functionally two-tier.

The *Coll14* is a two-tiered collection comprising fourteen secondary grouping of primary rubrics, called respectively τίτλοι and κεφάλαια. Its corpus is intentionally and

[43] *Syn* 10 n. (a).
[44] Zechiel-Eckes 1992,1.29-48; cf. Fiery 2008 on Dionysius' own attempts to provide a proto-systematic index in his title-listing.
[45] Zechiel-Eckes 1992,1.49 counts only about 20 titles (of 300!) with substantial groupings.

explicitly left in normal unsystematic corpus form, and this is the usual state of affairs in the manuscripts.[46] Its form is thus prototypically the following:

PROLOGUE (as many as three in the MSS) + LIST OF SOURCES + TWO-TIERED SYSTEMATIC INDEX + NON-SYSTEMATIC CORPUS.

As noted, certain versions of the systematic *Hispana* may be regarded as the morphological twin of the *Coll14*, containing a similar two-tiered initial index, and a non-systematic corpus.

In the Byzantine collections, when the secular laws are added, they are always added as a second discrete section under the rubrics after the canonical references, often beginning with "ὁ νόμος". In both cases, the secular laws are never actually mixed in with the canons themselves, and are easily extractable.

D. Source selection

As the Byzantine systematic collections present themselves as little other than glorified indices to their material, we might expect them, like any table of contents, to be comprehensive – i.e. to cover all of the corpus material. In this, as already noted, they do not fail. In fact, the single most striking – and important – aspect of the two principal Byzantine systematic collections is the almost total absence of any sustained process of selection vis-à-vis their stated sources. The reality of Byzantine systematic collections as simple re-arrangements and indexings of the corpus – and not as substantively creative new collections – is in no way better illustrated. The systematic indices are working around and from the corpus: the corpus is not being shaped to suit the indices.

This aspect of the collections has already been broached several times.[47] To summarize, this feature is particularly pronounced in the collection in the *Coll50*. The *Coll50* is nearly a literal re-arrangement of the corpus, inasmuch as very few canons are even repeated. One could write out each canon on a separate piece of paper and then simply re-arrange the pieces under topical themes to arrive at something like the 50 titles. It omits nothing. Even the repetitions are few.[48] Cresconius is very similar.[49]

The original *Coll14*, on the other hand, does seem to have omitted some canons in its systematic rubrics. However, as already noted, these are only from material that

[46] Although variations in the manuscripts for the *Coll14* (and *Coll50*) are not unknown. See Appendix D (2) for details.
[47] Chapter 1.C.1; Appendix A (7). This is also broadly true of Blastares.
[48] See Appendix B (7) for repetitions in the *Coll50*.
[49] Cresconius also has few repetitions; Zechiel-Eckes 1992,2.801-807.

the *Coll14* itself just added to the corpus; the material that was already established as "core" seems to have been faithfully represented. Indeed, the concern to full represent the corpus is in one sense more pronounced than in the *Coll50*, as the *Coll14* include many one-canon rubrics which seem to have been invented precisely to ensure topical representation for all canons. Some of these, in their very specificity, verge almost on the bizarre: for example 13.38, "On those who attempt to set at nought the enactments of Ephesus: Ephesus 6". Further, as noted, later recensions of the *Coll14* seem to have re-added the missing canons, at least in a catch-all chapter in Title 14. The basic imperative of the *Coll14* tradition is thus very similar: faithfully represent the canonical corpus.

E. The nature and constitution of the rubrics

The essence of the Byzantine systematic method is the subsumption of canons under thematic rubrics. These are then arranged in a (more or less) logical manner. Although seemingly simple, this process presupposes a) a careful reading of the canons to identify, distinguish and choose significant content; b) the creation of suitable categories to subsume that content; c) the association of similar canons with each other; and d) the provision of some type of overall structure. Each one of these steps provides opportunities for the interpretation and reshaping of the material.[50]

In this section our concern is with the first three steps, i.e. the formation and design of the rubrics themselves, and how they relate to their subsumed canons.

The hermeneutic relationship of rubric and canons is potentially complex. Rubrics may be introduced from elsewhere, for example, and the traditional material made to fit under them, thus subtly modifying their content; or the rubrics may subsume and group certain material in unusual ways; or the language of the rubric may imply specific readings of the canons; or the rubrics may show evidence of abstracting jurisprudential principles or concepts – or at least general topics – from the traditional material. The methodical creation of general categories might also highlight gaps in the legislation. For example, if one finds enough material to stimulate the creation of a topic on "episcopal marriage" one might wonder about finding (or inventing) material on "presbyteral marriage" and then "diaconal marriage" or "subdiaconal marriage".

In fact, as we might already suspect, relatively little of any of these activities are present in the Byzantine thematic rubrics. The hallmark of the Byzantine rubricization

[50] cf. Pinedo 1963,293-294, and the brief comments of Mordek 1975,4-6.

is instead deep conservatism and traditionalism. This conservatism is manifested in two interrelated ways.

First, the thematic rubrics are overwhelmingly derived from the canons themselves; with only one significant exception they are not imported from any outside source. This again demonstrates the close affinity of the thematic indices to table of contents: the content of the canonical titles is broadly inductive or exegetical, in the sense of being pulled "up" and "out" of the canonical material. In the *Coll14* this process is in fact two-fold: the κεφάλαια tend to be summaries of the canons, and the τίτλοι of the κεφάλαια. More advanced forms of rubricization, identified by Pinedo in later western collections, where a rubric is created as a thesis to be endorsed (e.g. rubrics on papal primacy in the Gregorian collections) or as a problem to be solved (Gratian), are hardly evident.[51] Likewise there is almost nothing parallel to Bernard of Pavia's direct borrowing of titles from the *Digest* for his decretal collection.[52]

Second, the thematic rubrics show very little evidence of jurisprudential abstraction of any sort. There is thus little independent distillation of legal principles or general legal concepts; little attempt to extrapolate from specific regulations to more general norms; no attempt to discern or establish distinctions not already present in the canons; little introduction of new terminology; almost no attempt, even indirectly, to address contradictions; no provision of tools for extended rules to cover gaps; no attempt to organize canons according to internal principles; and, finally, even the degree of generalization, the (ostensibly) basic concern of the whole system, in not uniformly pursued across the rubrics. Instead, to a point that at times verges on the bizarre, the rubrics adhere very closely to the surface contours of the canons themselves, deeply transparent to, and bound by, the canons themselves. The majority of titles are thus either very close paraphrases, or even literal composites, of specific canons' contents, or very innocuous summaries focusing on one or two key words from the canons – what Pinedo has aptly called "resume rubrics".[53]

To examine these tendencies in greater detail, we may begin with an example of a typical "resume" rubric:

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[51] Pinedo 1963,291-292; cf. Fournier 1931,1.77. The best example of the former may be the *Dictatus Papae*, if, as now often suggested, they were originally the headings for a planned canonical collection. See Ferme 1998,166-169; Kuttner 1947,400-401.
[52] See Pennington 2008,297-298, and the table in Friedberg 1879,2.xx-xxviii.
[53] Pinedo 1963,289, 292-293.

Coll14 8.16

Περὶ τοῦ μὴ ὀφείλειν κληρικοὺς συνεστιᾶσθαι τῷ δευτερογαμοῦντι ἢ παρανόμως γαμοῦντι. Συνόδου Νεοκαισαρείας κανὼν ζ΄.Τιμοθέου κανὼν ια΄. (Regarding that clerics ought not to feast with those getting married for the second time or those married illicitly. Neocaesarea 7 and Timothy 11.)

These canons are as follows:

> Neoceasarea 7: Πρεσβύτερον εἰς γάμον διγαμοῦντος μὴ ἑστιᾶσθαι, ἐπεῖ μετάνοιαν αἰτοῦντος τοῦ διγαμοῦντος τί ἔσται ὁ πρεσβύτερος, ὁ διὰ τῆς ἑστιάσεως συγκατατιθέμενὸς; (A presbyter is not to feast at the marriage of one getting married for the second time, for if the digamist must do penance, what type of priest will he be who through his attendance approves the marriage?)
>
> Timothy 11: [Question posed: Can a cleric attend various types of dubious marriages?]
> Ἀπόκρισις. Ἅπαξ εἴπατε· ἐὰν ἀκούσῃ ὁ κληρικὸς τὸν γάμον παράνομον. εἰ οὖν ὁ γάμος παράνομός ἐστιν, οὐκ ὀφείλει ὁ κληρικὸς κοινωνεῖν ἁμαρτίαις ἀλλοτρίαις. (Answer: You have just said 'if the cleric hears that a marriage is illicit'; if the marriage is illicit, the cleric ought not to participate in the sins of others.)

In this example, it is evident that the rubric is a fairly simple summary of the content of the two canons, and that even much of the basic language of the rubric is derived directly from the subsumed canons: ἑστιᾶσθαι, ὀφείλει, γάμος παράνομος, κληρικός.

Sometimes the rubric is virtually a straight citation of a canon. Thus *Coll14* 1.10, for example, reads Περὶ του μὴ χειροτονεῖσθαι τινὰ ἐπίσκοπον ἢ πρεσβύτερον ἢ διάκονον πρὶν ἢ πάντας τοὺς ἐν τῷ οἴκῳ αὐτοῦ χριστιανοὺς ὀρθοδόξους. The one subsumed canon, Carthage 36, differs only slightly in structure: ὥστε ἐπικόπους καὶ πρεσβυτέρους καὶ διακόνους μὴ χειροτονεῖσθαι, πρὶν ἢ πάντας τοὺς ἐν τῷ οἴκῳ αὐτῶν χριστιανοὺς ορθοδοξους ποιήσωσιν.

This literal, surface correspondence of the rubric to canons is often so close that when there are multiple elements in a rubric, one can generally trace each element to specific canons under the rubric. For example, in *Coll14* 1.12, Πῶς ὁ ἐθνικὸς ἢ ὁ ἐν νόσῳ ἢ ὁ νεωστὶ βαπτισθεὶς καὶ ὁ ἐκ φαύλης διαγωγῆς χειροτονεῖται ἐπίσκοπος ἢ κληρικός, four canons are subsumed, each treating some aspect of ordination. From Apostolic 80 comes the reference to ἔθνος and φαύλη διαγωγή, from Nicaea 2 ἐθνικός and the problem of recent ordination (νεωστὶ βαπτισθεὶς paraphrasing ἅμα τῷ βαπτισθῆναι), from Neocaesarea the reference to νόσος, and in Laodicea again the problem of rapid ordination.

The same tends to be true for the *Coll14* title rubrics: each element of the rubric can often be fitted to sections of chapters, and often in a similar order. For example, Title 3, "On prayers, psalmody and readings and anaphora and communion and apparel and services of readers, singers and servers" may be divided into four rubrical fragments each of which corresponds to a distinct section of chapters: on prayers (= κεφάλαιον 1), psalmody and reading (= κεφάλαια 2 and 3), anaphora and communion (=κεφάλαιον 4 to the conclusion of the title, with the terms from κεφάλαιον 4). The last rubrical fragment, on apparel and services of readers, singers and servers, corresponds only to chapter 10, perhaps singled out because its specific content.

This summary-literalism is particularly pronounced in the *Coll50* where it provides the key to unraveling one of the text's most curious mysteries. Beneshevich long ago noted that there exists in the manuscripts two traditions of arranging the canons under each rubric: a normal arrangement according to the corpus order (citing first the Apostles, then Nicaea, then Ancyra, etc) and a "systematic" arrangement, which is highly irregular. Beneshevich was very careful to detail and schematize this systematic arrangement in both his 1914 study, and again in his 1937 edition of the *Coll50* (published a year before the great scholar was murdered by Stalin).[54] To my knowledge, he never changed his assessment in his first study: "To establish the grounds on which this [systematic] order of rules was constructed is extremely difficult, and even impossible."[55] Because of this obscurity, and especially because this "systematic" order only occurs in 33 of the titles, he decided that the corpus-order form was likely original.[56]

Once we realize, however, that these collections are constructed by deriving rubrics from a specific canon or canons, with other canons then grouped with these source canons, the nature of this systematic order becomes quite clear. In the systematic titles, the canons are simply being placed in the order that corresponds to the order of the compound rubrics in each title. For example, Title 14 reads as follows: Περὶ τοῦ μὴ δεῖν ἐπίσκοπον ἢ ὅλως ἐν κλήρῳ καταλεγόμενον κοσμικὰς ἀναδέχεσθαι καὶ δημοσίας φροντίδας, πλὴν εἰ μὴ κατὰ νόμους ἀναγκασθείη, μήτε δὲ δανείζειν ἐπὶ τόκῳ ποτὲ ἢ ἐγγύαις ἑαυτὸν ἐκδιδόναι, μήτε στρατείαν ἑαυτῷ περίνοιεῖν καὶ ἀξίωμα. This title subsumes nine canons. In corpus order they are Apostolic 6, 20, 44, 81, 83; Nicaea 17; Laodicea 4; Chalcedon 3, 7 – and so they are listed (more or less) in most manuscripts

[54] *Sin* 224-247; *Syn* xvii-xx, 261-265.
[55] *Sin* 244
[56] *Sin* 224-225.

of the non-systematic type. In the systematic manuscripts, however, they are in this order: Apostolic 6, 81; Chalcedon 3; Apostolic 44; Nicaea 17; Laodicea 4; Apostolic 20; Chalcedon 7; Apostolic 83. If we repeat the title rubric and place the canons in the systematic order alongside of it, the correspondence is perfect (close literal correspondences in parentheses):

> Περὶ τοῦ μὴ δεῖν ἐπίσκοπον ἢ ὅλως ἐν κλήρῳ καταλεγόμενον κοσμικὰς ἀναδέχεσθαι καὶ δημοσίας φροντίδας = Apostolic 6 (κοσμικὰς φροντίδας), 81 (δημοσίας διοικήσεις)
>
> πλὴν εἰ μὴ κατὰ νόμους ἀναγκασθείη = Chalcedon 3 (πλὴν εἰ μήπου ἐκ νόμων καλοῖτο)
>
> μήτε δὲ δανείζειν ἐπὶ τόκῳ = Apostolic 44 (τόκους...δανειζομένους), Nicaea 17 (ἐπὶ τόκῳ...δανείζοντες), Laodicea 4 (δανείζειν καὶ τόκους)
>
> ποτὲ ἢ ἐγγύαις ἑαυτὸν ἐκδιδόναι = Apostolic 20 (ἐγγύας διδοὺς)
>
> μήτε στρατείαν ἑαυτῷ περίνοιεῖν καὶ ἀξίωμα = Chalcedon 7 (ἐπὶ στρατείαν...ἐπὶ ἀξίαν...), Apostolic 83 (στρατείᾳ σχολάζων)

Not all of the 33 titles with this type of ordering work quite so neatly – there is a certain amount of "messiness" across the manuscripts. But most are very close.[57]

With the logic of the systematic order revealed, Beneshevich's argument that the corpus-order arrangement is original becomes much weaker. The systematic order would seem to be much more in keeping with an original process of composition in which like canons were grouped together, rubrics formed for them, and then these groups combined together to form the extant titles.[58] The collection is also certainly much easier to use, and more logical, in the systematic order; without it, one has to search about for the canons pertaining to each rubric. Further, it seems much easier to imagine later copyists transforming the odd-looking systematic order into a much more normal corpus-order, than the opposite; the latter would have taken considerable analysis and work. It is also interesting that two of the four oldest manuscripts for the *Coll50* are in this order.[59] Finally, the curious fact that only 33 of the titles seem to evince a systematic order is deceptive. In most of the 17 remaining titles, the order of

[57] The correspondences in titles 12, 20, 24, and 36 are rather uneven.
[58] It is also possible that some of the otherwise somewhat obscure details of Scholastikos' description of his work in the prologue make more sense in this reading. In particular, the repeated assertions of attaching "like to like"(*Syn* 5.11,14; cf. 5.6-7) and thus making the "division of the canons" clearer "by a juxtaposition of the material" (σαφεστέραν...τῇ παραθέσει τῶν ὁμοίων ποιῆσαι τῶν κανόνων τὴν διαίρεσιν) (5.13-14) – unlike, apparently, the *Coll60* – may imply this process. Is the lack of this type of internal canonical grouping precisely what he finds objectionable in the *Coll60*?
[59] Paris Cois. 209 and Venice Nan.22 (both 9th-10th C).

the rubrical fragments in the titles is in the "normal" corpus order – in other words, in these titles the "systematic" order is the corpus order.[60]

The basic compositional imperative of both collections – to "pull" the rubrical topics overwhelming out of the canons themselves – means that, as we have already noted, the systematic indices read much more as summary statements of the content of the corpus than as significantly rationalized jurisprudential interpretations or abstractions. Creative shaping of the material is still possible, and evident, but as a rule it is uneven, occasional, and rarely deeply significant. Instances are often so subtle that it is often not clear how conscious they are.

We may here provide a short survey of some of the most important ways in which the rubrics interpret or otherwise modify canonical content.

The introduction of new terminology represents one of the simplest ways in which the rubrics can "filter" and direct the reading of the canons. However, if one isolates all instances in which the language of the rubrics diverges from a very close and literal representation of the subsumed canons, most are revealed to be quite insignificant. Many instances can be dismissed as paraphrases of the most innocuous and banal type, modified for entirely pragmatic or stylistic reasons. For example, in *Coll50* 28 the strange Laodicean θεωρίας θεωρεῖν becomes θεωρίας ὁρᾶν; in title 6 the term ἀποδημοῦντα is used to convey the bulkier πρὸς τῇ τελευτῇ τοῦ βίου τυγχάνῃ in Antioch 23; in Title 10 εἰς ἣν καθιερώθησαν replaces εἰς ἐχειροτονήθη in Antioch 18, probably for reasons of *variatio*, to avoid repeating χειροτον- roots excessively in the rubric; *Coll14* 1.38 changes Neocaesarea's ἀφιέναι to λύεσθαι; *Coll14* 3.22 changes Timothy 14 ἑαυτὸν χειρώσηται to the somewhat more standard ἑαυτὸν ἀνελόντος. Most paraphrases, in fact, are of this type.

Sometimes paraphrases appear to be a little more significant. Nevertheless, in many of theses cases, the "intruding" term may be found already present elsewhere in the corpus, often in a similar context. As such, these do not represent the ingress of "external" concepts. Thus, for example, *Coll50* 14 cited above contains the interesting phrase μήτε στρατείαν ἑαυτῷ **περινοιεῖν** καὶ ἀξίωμα ("devising" a office or dignity) Although in its context this phrase is clearly intended to be a summary paraphrase of Chalcedon 7 and Apostolic 83, the term περινοιεῖν does not appear in either canon. However, this apparently interesting phrase finds its direct origin in Serdica 7, a canon

[60] Although here too not all titles work perfectly; there is still considerable "messiness" in titles 5, 6, and 11, for example.

from the previous title, which speaks of κοσμικὰ ἀξιώματα καὶ πράξεις περινοιεῖν τισιν. It seems this phrase has been unconsciously transferred. Many examples of this type can be found.[61]

Only very occasionally are significant terminological innovations to be found. Indeed, they are so rare that they are quite conspicuous. The external idea or term is invariably from either secular legal or Scriptural sources (or both). Thus, for example, the term and concept of πατριάρχης – a biblical term, originally, and present as a technical ecclesial office term in the secular legislation from the 6th C onwards, but nowhere present in the canons[62] – enters the Byzantine canonical tradition first in *Coll50* 1, and again in *Coll14* 1.5. In the last, it is also joined by the term πρίματες (καὶ τῶν ἐν Ἀφρικῇ λεγομένων πριμάτων), a Latin loan word found nowhere in the canons.[63] The introduction of both these terms is potentially significant in that they lend a degree of conceptual precision to a very fuzzy area in the canons: supra-metropolitan jurisdiction.

Another good example is θεολογία in *Coll14* 1.1: Περὶ θεολογίας καὶ ὀρθοδόξου πίστεως. This term appears nowhere in the canons upon which the *Coll14* was built. In this particular chapter, most the canons mention πίστις, which accounts for the second part of this rubric. On the rule of summary-literal rubric formation, however, Apostolic 49, 50 (on baptism) and Constantinople 5 (on Trinitarian belief) are not accounted for – they do not mention πίστις. They do, however, each use the phrase "Father, Son, and Holy Spirit". It is thus very likely that θεολογία here is meant to paraphrase "Father, Son and Holy Spirit" in these canons (and not mean "theology" in is more modern sense). This is confirmed by the fact that this rubric – very unusually – is probably modeled on a rubric of the imperial codices: *De summa trinitate et de fide catholica* (*CJ* 1.1) = Περὶ τῆς ἀνωτάτω τριάδος καὶ πίστεως καθολικῆς (*Basilica* 1.1) or Περὶ τῆς ἀνωτάτω τριάδος καὶ πίστεως καθολικῆς ἤτοι ὀρθοδόξου (*Tripartita* 1). In the *Coll14*, θεολογία has simply been substituted for τῆς ἀνωτάτω τριάδος.

Coll14 1.1 is part of the only significant example of external rubrical "borrowing" evident in either Byzantine collection. Broadly, *Coll14* 1.1-6, and the rest of the title, can be read as modeled on the first book of the *CJ*. Although close linguistic

[61] See, for example, Coll50 20 (ἐφοδιάζεσθαι, from Antioch 11), 25 (καὶ περὶ τῶν ἐκ συναρπαγῆς χειροτονουμένων, from Apostolic 33), 26 (ἐν κυρίῳ γαμεῖν, from Basil 41), 39 (εἰδολοθύτου, from Gangra 2).
[62] See Liddell-Scott 1348; Lampe 1051-1052. In the civil legislation, see *N.* 3.2.
[63] This seems to be the first Greek attestation of the term; I can find no earlier reference in any lexical resource, or the *TLG*. The source is obviously meant to be Carthage, but in the extant translation *primates* is rendered by its normal Greek translation πρωτεύων (e.g. Carthage 17).

parallels are mostly not evident, we may note the following correspondences: *Coll14* 1.1(on faith) = *CJ* 1.1, but by extension 1-13, the whole "sacred" section; *Coll14* 1.2-4 (on types of valid sources) = *CJ* 1.14-25; *Coll14* 1.5ff (on offices) = *CJ* 1.26ff. Coll14 1 is thus a kind of mini-ecclesial version of *CJ* 1. This undoubtedly accounts for the comparatively organized and "rational" nature of the organization of Coll14 1.1-5, particularly the exceptionally "legal" concern about sources in Coll14 1.3, 4 ("Which canons must be obeyed" and "That ecclesiastical custom must be kept as law, and that we do not need to keep the law of Moses"). As a point of interest, the similarity with the later *Basilica* titles is even more defined: *Coll14* 1.1 = *Basilica* 1; *Coll14* 1.2-4 = *Basilica* 2; *Coll14* 1.5ff = *Basilica* 3 (only on clergy, with the added emphasis in the rubric, like *Coll14* 1, on "ordination"). More broadly, the resonance is present with any other legal collections that begin with "faith" or general doctrinal matters and then "source" matters. We may also note that just as the beginning of *Coll14* 1.1, "On Theology, and Orthodox Faith...", seems to be a paraphrase of *CJ* 1.1, so likewise, the second title, "On the making of churches, and on sacred vessels and offerings...etc." is reminiscent of *CJ* 1.2: "On the most holy churches and the things and privileges of them".

The influence of the codex might also be felt in one other place: the strange inclusion in *Coll14* 12.5 of the name of Porphyry in a list of heretics. This name is no where present in the canons. It is presumably referring to the (pagan) Porphyry condemned in *CJ* 1.1.3.

A number of Greco-Roman legal-administrative terms without any precedent in the canons also appear in the indices, notably ἀντίδικος in *Coll50* 15 (for various terms for "accuser" in Chalcedon 9); or ὀφφίκια in *Coll14* 1.24 for various offices listed in Chalcedon 2; or most strikingly, in *Coll14* 9.6 ἀναψηλάφησις in its technical Justinianic sense as a calque for *retractio*, re-trial/re-examination.[64] Their presence effects a further stylistic legalization of canonical discourse.

The principal example of biblical language "invading" canonical discourse may be found in *Coll14* 3.18 and 4:16. Chapter 3.18 reads "That a woman ought not to take communion in the days of her impurity [ἐν ταῖς ἡμέραις τῆς καθάρσεως αὐτῆς]" Chapter 4.16 is identical, but on baptism. The two canons subsumed by both, Dionysius 2 and Timothy 7, refer respectively to "women in their menses" (αἱ ἐν ἀφέδρῳ γυναίκες)

[64] See Liddell and Scott 127, Roussos 1949,1.46 Although ψηλαφάω in the sense of *tractio,* examine, may be found as translationese in Carthage (e.g *Fonti* 1.2.206.20-21, 208.11).

and "the custom of women" (τὸ κατ᾽ ἔθος τῶν γυναικείων). The rubric's phrasing of "in the days of her impurity" is drawn directly from Leviticus 12:4, 6, and/or its New Testament parallel, Luke 2:22. The reason for this change is probably stylistic, but it does pose a subtle problem of interpretation. In Leviticus and Luke it is quite clear that, strictly, this phrase refers to the period of purification following childbirth. The canons, however, refer to menstrual periods. This distinction is not, in the long run, significant – the two types of blood impurity are clearly assimilated to each other in Scripture (Lev 12:2), and in later church tradition. However, the rubric does perhaps contribute to, or at least reflect, the blurring of the distinction.

Turning from terminology to broader conceptual issues, we may return to our observation above that even the most basic "digestive" operation of the rubrics – the provision of general topical categories – is surprisingly limited and feeble in its application and implications. Very rarely does the formulation of the general topics demonstrate any particular creativity, extending much beyond a fairly basic and literal summary of the canons concerned – certainly not to the formulation of internal principles or concepts. In the *Coll50*, in fact, relatively few truly general rubrics are to be found at all. The majority of its rubrics are not so much topical rubrics ("On x", "on y") *per se* as summary rules, and as such quite specific. For example Title 3 reads "That a bishop must not go beyond his diocese without being asked unless to attend to his property; and he must not ordain beyond his borders". This is a summary rule, complete with an exception. Even the more properly "topical" rubrics tend to be quite long and complex. For example, Title 10: "Regarding bishop or presbyters who are ordained and whose service is not accepted or received by the city into which they were consecrated, not because of their own doing but because of others, or those who after ordination neglect the people and the clergy". The *Coll50* thus reads almost as a summary statement of corpus rules, virtually an organized canonical synopsis.[65]

Occasionally more general rubrics do seem to emerge in the *Coll50*, but they often prove to be less impressive than they first appear. In several titles, for example, the very first rubric fragment seem to be the most general, and comes close to functioning as a general rubric for the title.[66] For example Title 33 begins with the rather general injunction that ascetics must obey their bishops (Περὶ τοῦ δεῖν τοὺς ἀσκητὰς ὑποτετάχθαι τοῖς ἐπισκόποις), but three of the following four rubrics have

[65] Is the *Coll50* – or the *Coll14* – an organized canonical synopsis? See Appendix D (3).
[66] E.g. 18, 24, 25, 37, 48, 50.

nothing to do with obedience to bishops *per se* (monks not leaving the place in which they are assigned, monastic properties not again becoming secular, and slaves not becoming monastics without the permission of their masters). The real topic of the rubric is something more general, perhaps "On monastic discipline" – but this is precisely the kind of abstraction these titles do not engage in. In this particular example the first rubric is in fact created by a normal surface resume process from Chalcedon 3 (including the line τοὺς...μονάζοντας ὑποτεταχθαι τῷ ἐπισκόπῳ).

This tendency to leave even topical generalization and distillation comparatively implicit is curious. It is a pattern, however, that has been remarked of ancient thought generally, and especially of ancient Roman jurisprudence.[67] In distinction to modern tendencies, general rules or principles are not usually explicitly distilled out of specific regulations; instead, one tends merely to juxtapose traditional texts, and allow the reader to make the inductions. This very curious and, for moderns, unintuitive tendency is an important aspect of the traditionalism of many ancient legal systems: the law *is* the traditional texts, and thus extrapolating from the laws to create more abstract principles is left implicit. Such extrapolation is done, but its results are in a sense secondary, ephemeral, and subordinate to the traditional texts themselves. The movement from the laws to law is fairly quiet, and leaves little trace.

The *Coll14* contains many more general and more sophisticated topical rubrics. Examples of basic general rubrics include "On the holy anaphora and communion" (3.4), "How one must baptize" (4.3), "On offerings" (6.1), "On lawsuits of bishops and clerics" (9.5), "For what reasons one is deposed" (9.14); "On those who divorce" (13.4) and even "On greed" (14.1). The *Coll14* also sees the fairly extensive use of another type of generalizing rubric: the multiple-aspect rubric. In these rubrics, various aspects of one or more provisions are indicated through the use of multiple relative interrogatives: e.g. "Regarding whom and where one ordains bishops..." (1.6), or "Regarding who, and how, and what type of things, one must sing.." (3.2).[68]

Upon closer inspection, however, the texture of generalization of the work as a whole is very inconsistent, and at times downright odd. Sometimes, for example, such topics only sound general, but in fact encompass only a few canons. Thus 6.1 reads "On offerings" – sounding quite broad – but subsumes only three canons; 10.2 purports to gather all canons on "the administration of ecclesiastical affairs", but only contains 7

[67] See the references in chapter 3, n. 85.
[68] The *Coll50* contains only one such rubric, in Title 49.

canons, mostly those which actually use the words "management" and "affairs"; *Coll14* 14.1 "On greed" is purpose built for one canon.

On the other hand, such chapters can be truly general in their representation. Chapter 1.6, cited above, encompasses 24 canons that all in one way or another relate to the whom and where of ordaining clergy; Chapter 9.14, also cited above, contains 53.

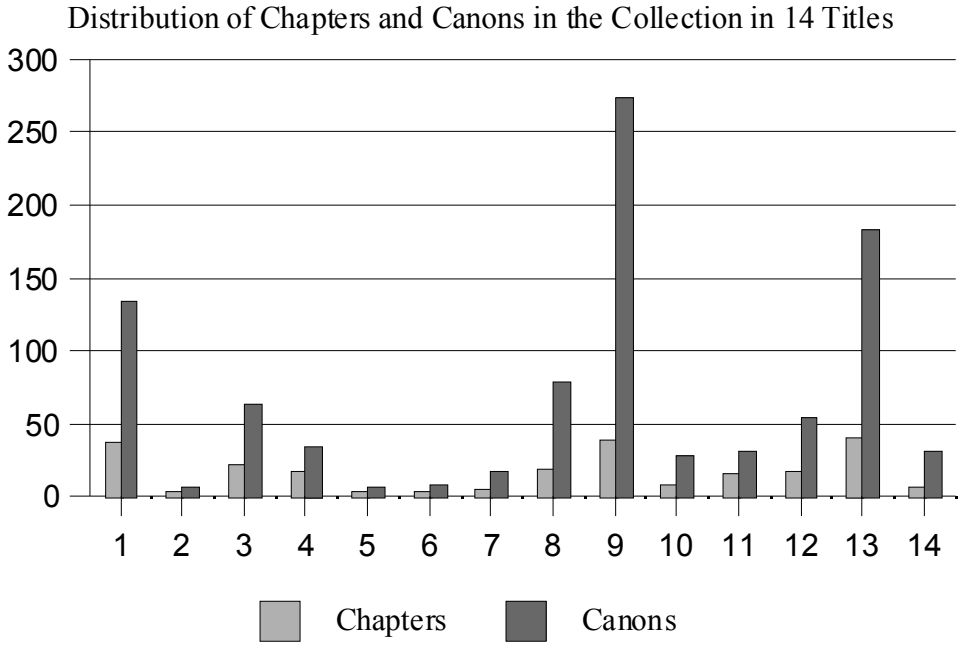
These rubrics, however, are more than counterbalanced by one of the most curious aspects of the *Coll14* (already noted): the presence of many (92) single-canon chapters, almost 39% of the total. These can become bizarrely specific, as already noted. More typical examples include *Coll14* 14.1, just cited.

A pattern may also be observed in the *Coll14* in which general chapters are followed by a series of much more specific chapters on the same basic topic, and often repeating the same canons as the general rubric. The best example are the very general "punishment" rubrics in 9.10, 9.11, 9.14, 9.15, 9.16, 9.18, and 9.19 – each listing the canons for deposition, excommunication, anathema, etc. These are followed in 9.21-9.39 by rubrics that subsume many of the same canons again, but now in much greater detail, listing specific canonical infractions. Similarly, chapter 1.6 a very general multiple-aspect rubric on who, where and how clergy are ordained, effectively heads the rest of the title's chapters, each of which deal with some specific aspect of ordination – these "unpack" the detail of the first general chapter. Similar patterns are evident especially in Titles 3, and 10, and more sporadically elsewhere.[69] The presence of these sub-groupings in fact occasionally transforms the *Coll14* into a functionally three-tier collection: title topics, subgrouping topics, chapter topics. The effect of this technique, however, is that the *Coll14* has not so much produced an even, general account of the corpus content as it has provided both a general *and* specific account. It makes the *Coll14* read as virtually as specific and detail-oriented as the *Coll50*. The imperative in both collections is clearly still to convey as much of the surface content of the corpus as possible.

The unevenness and comparative irrationality of generalization in the *Coll14* is finally very marked in the wildly varying scope of the fourteen titles themselves. Titles such as 1 (On theology, and orthodox faith, and canons, and ordinations), or 9 (On sins and cases of bishops and clerics and suspension and deposition and repentance and

[69] Titles 6, 7, 8, 13.

which sins ordination looses[70]), or 13 (On laity) sound very broad, and in fact do encompass a large and varied number of canons. However, these titles sit alongside the much more specific and detailed title 2 (On the making of churches, and on holy vessels and dedications and clerics establishing sanctuaries against the will of their bishop), and 5 (On those who despise churches and synaxeis and memorials and those eating in church and on agapae), and 6 (On offerings), which each encompass only a very few and much more specific set of topics and canons. The unevenness of canonical representation, in particular, is well illustrated in the distribution of chapters and canons throughout the collection:



If topical generalization as basic summary is timid and desultory in the Byzantine collections we should not be sanguine about the presence of other types of interpretation, rationalization or legal innovation. Indeed, they are rare. Even those that are present often appear more creative and innovative than they actually are; as a rule, they only highlight or follow – and convey – a thread of thought already present in the corpus.

In almost no case do topical generalizations fade into true doctrinal distillation or even rule abstraction – i.e. very rarely does a rubric seems to name an abstract quality or underlying concept of a group of canons. Instead, as we have already seen, the instinct is to simply relate surface content or at most stack different, if related, surface topics one after the other. Thus, for example, *Coll14* 3 "On prayers, psalmody and

[70] This bizarrely specific final rubric, which refers only to 9.38, is an excellent example of the tendency to juxtapose very general and very specific rubrics.

readings and anaphora and communion and apparel and services of readers, singers and servers" which addresses numerous specific matters relating to "holy" matters and services does not become "On holy matters" or "On services in the church" or "On sacraments". Certainly no where do we find attempts to analyze the canons in terms of different types of powers or authority (teaching, administrative, sacramental), or different types of rights or obligations. There is not even a branching categorization of the material into more abstract γένος-εἶδος "pyramidal" categories as may be found in the Institutes tradition, and which Fuhrmann has demonstrated to be an absolutely common and standard method of classical systematic presentation in rhetorical, philosophical, and grammatical manuals.[71] Even Gregory of Nyssa's categorization of canonical regulations into the three faculties of the soul has no impact on later structures. In general, one can almost feel a resistance to the formation of rubrical topics that stray too far from the literal content of the canons themselves.

Two exceptions seem to be present in the *Coll50*. In Title 1 and 2 we read of "honour" being "defined" for patriarchs and then metropolitans: Περὶ τῆς ὁρισθείσης τοῖς πατριάρχεις ἐκ τῶν κανόνων τιμῆς... Περὶ τῆς ὁρισθείσης τοῖς μητροπολίταις ἐκ τῶν κανόνων τιμῆς... The repetition of virtually the same expressions enhances a sense that τιμή is being turned into an abstract category to convey "powers" or "rights" granted by the canons. Likewise, in Title 36 the final rubric καὶ περὶ πίστεως ὀρθόδξου ἣν ἐκμανθάνειν ἀνάγκη τὸν φωτιζόμενον ("regarding the Orthodox faith which one being enlightened must learn thoroughly") might seem to suggest an abstract sense of "Orthodox faith" in the sense of "collection of beliefs and doctrines" – especially as some of the subsumed canons treat matters of baptismal faith, and the Trinity. When the subsumed canons are inspected more closely, however, the level of abstraction in the rubrics is shown to be at least partially illusory – almost accidental. Certainly the much more normal, literal process of surface paraphrasis is still operative. Thus the relevant canons in Title 1 and 2 (Nicaea 7, Constantinople 4, Antioch 9, Chalcedon 3, 12) all mention the term τιμή more than once, and do often focus on honour matters – the title is thus talking about "honour" in a more literal form than seems immediately obvious. A more abstract "loading" of this word is still perhaps implied, but it is not as dramatic as it first appears. It is only associatively connected to a concept already present in the corpus. Similarly, in Title 36 the corresponding canons are clearly referring to learning the creed itself (thus ἐκμανθάνειν here almost certainly means

[71] Fuhrmann 1960.

"learn by heart"), and the rubric is in fact drawn directly from Laodicea 11 and 12, on learning the creed. Other canons relating to the content of the faith are then also associatively added (although the selection is a little odd, including the canons treating valid baptisms; having the words "Father, Son and Holy Spirit" seems especially important), but the process of abstraction is again fairly limited: a rule is pulled literally from the canons, and then other material associated with it. This is a type of abstraction, but it is not truly the provision or even distillation of an abstract conceptual category in the way that it may first seem.

Even the creative subsumption of a canon under a rubric to which it does not have an immediate surface-topical relation – i.e. that does not strictly seem to correspond to the canon's rule content, and, more strikingly, does not demonstrate any obvious linguistic correspondences between rubrics and canons – is rare. In these cases, a process of interpretive extrapolation might seem to be present. However, the few instances that can be found can often be explained by rather more mundane reasons. For example, Laodicea 42 reads "That a hieratic or cleric must not travel without the command of the bishop." This is placed, logically, under *Coll14* 8.2, "That a bishop or cleric must not travel at will from home to live in another diocese". Yet it is also placed under 8.5: "Regarding the reception of foreigners, and regarding letters pacific and commendatory". The collector may seem to be making an interpretative jump, extrapolating, perhaps, that the "command" implies a letter, and that therefore it is appropriate under 8.5 as well, or that a traveling cleric must be a "foreign" cleric. However, its placement in 8.5 is almost certainly due to the fact that is drawn into this chapter as part of a series with the canon that immediately proceeds it: Laodicea 41 "That a hieratic or cleric must not travel without letters of communion." The motivation for the placement of Laodicea 42 in 8.5 is thus the rather accidental existence of pre-made text-link with Laodicea 41 in the corpus – and not a process of independent jurisprudential abstraction of possible rule-applications. The author is recognizing and following a textual link already present in the canons.

Some parts of the collections do show a typically systematic and rationalistic concern for methodical progression and presentation. The best example is the penal rubrics of *Coll14* 9.10, 9.11, 9.14, 9.15, 9.16, 9.18, and 9.19, most asking "from which reasons..." different types of penalties are imposed, and broadly progressing from least to most severe. A few encompass a huge number of canons (e.g. all canons for which one can be deposed). Similar are the very many double (or even triple) rubrics in the

Coll14 which repeat certain canons under different titles to highlight different applications of the same canons. For example, Laodicea 30, which forbids the bathing with women of "higher clergy, clerics, ascetics...or any Christian or lay person", is subsumed under three rubrics under three different titles: "Regarding higher clergy who bathe with women" (9.31 – under the title on clergy); "That ascetics may not bath with a woman" (11.07 – under the title on monastics); "That men may not bath with women." (13.25 – under the title on laity). Very often, as in these last examples, only the subject of the rubric changes. At other times different material aspects of the same topic will be explored. For example, in 3.18 and 4.16 cited above, the first rubric conveys the rules in regard to the eucharist, and in the second, baptism.

All of these examples, made possible by the *Coll14*'s willingness to repeat canonical references, show a certain level of analytical sophistication, and, more so, the sense that similar analogous topics should be explored thoroughly for different circumstances. Almost never, however, do they push the canonical material beyond its own content, or evince any real creativity. The penal categories in Title 9 are thus all quite obviously present as categories in the canons, and the divisions of multiple subject or object applicability are all very simple, following basic surface divisions in the canonical material itself.

In the *Coll50* a slightly more sophisticated type of methodical progression may be found in the first two titles of the *Coll50*, already mentioned. Although not sharing any canons, each poses a similar rubrical "question" to a descending series of subjects:

Coll50 1	*Coll50* 2
Regarding the honour defined for the patriarchs by the canons	**Regarding the honour defined for the metropolitans by the canons** and metropolitan areas formed by imperial letters
and that none of them are to seize a province belonging to another...	**and regarding that they must not seize a diocese belonging to another...**

This is a small but significant attempt to apply systematically a common doctrinal framework to disparate material, especially as the second highlighted rubric is not a literal extraction from any canon in either title (although it recalls Nicaea 16 and Antioch 16). One would almost expect a similar set of rubrics for bishops, and perhaps other clergy. However, this attempt at methodical rubrical application goes no further.

Another sign of the advanced, analytical digestion of rules may be observed when more than one rule is extracted from the same canon. This represents a proper analysis of rule content, and can suggest a very subtle step in the direction of thinking of

the canons more as containing or expressing the rules, instead of simply *being* the rules. However, most of these examples follow obvious breaks within the canons themselves: in effect, the collector assigns different "parts" of the canons to different rubrics. The most obvious example is the dissection of the compound canon Carthage 16, which contains five entirely disparate rules. In this case, they are marked by clear literary markers: three ἤρεσεν ἵνα/ὥστε phrases, one straight ἵνα phrase, and one καί+third person subjunctive phrase. The rules are that clergy cannot be procurators; that readers at puberty much decide about marriage; that clerics cannot take interest; that deacons may not be ordained before they are 25 years old; that readers may not bow to the people. The canon is naturally thus cited under five appropriate rubrics (*Coll14* 1.28, 8.11, 8.13, 9.27, 9.29).

Sometimes the dissection of a canon is slightly more sophisticated. Chalcedon 25, for example, is concerned primarily with the prompt filling of vacant dioceses by metropolitans. It is thus assigned its very own rubric on this very topic, *Coll14* 1.9. At the conclusion, however, it also adds the following supplementary regulation: "The revenue, however, of the widowed church will be kept secure with the steward of that church". As a result, the canon is also subsumed under 10.3: "Regarding the affairs and revenue of churches without bishops." Another good example is the extraction from Nicaea 8 (a canon on the reception of Cathari) of its final clause ("...that in one city there be not two bishops) by the canon's citation under *Coll14* 1.20 ("Regarding that there are not in one city two bishops"). A relatively passing epexegetical comment is thus almost elevated to a general principle – or at least strongly emphasized.

A closely related – and classically jurisprudential – tendency is the distillation of distinctions, definitions and principles. The *Coll14* is, on the surface, seems quite notable for this. Definitions or distinctions can be found in at least five chapters: "Who are clerics or of the ecclesiastical order?" (1.31); "Regarding the difference between letters pacific and letters commendatory" (8.6); "What is heresy, what is schism, and what is *parasunagoge*? (12.1); "What is a heretic"? (12.2); and the last element of "Regarding corruption, and marriage of a widow, and who is called a widow" (13.7).[72] The best example of the articulation of a principle of law is 9.17: "That one must not prosecute twice for the same case." The first rubric of 1.3, although a little less general, can also be considered a general rule: "That unwritten ecclesiastical custom should be

[72] See also 1.4, 8.17, 12.14.

kept as law...", as can 1.4 "That canons are issued not by one bishop but by the commonality of bishops".

It is clear, however, that these few definitions and principles do not constitute a serious systematic attempt to derive a coherent set of definitions and principles from the material. First, they are far too desultory. Second, and more importantly, only a few represent real jurisprudential analysis on the part of the collector. Most are easily and directly derivative from the subsumed canonical texts and thus represent little more sophistication than any other derivative rubrical topic – although they are, of course, being highlighted. Critically, however, they do not entail original distillation of a general rule from a wide selection of canons – they are instead relatively simple extractions or paraphrases of one or two canons. Thus, for example, the principle present in 9.17 is derived virtually word for word from Nahum 1:9 (...οὐκ ἐκδικήσεις δὶς ἐπὶ τὸ αὐτό), which, as noted, is one of the few principles stated as a principle in the canons themselves – three times, in fact (Apostolic 25, Basil 3, Basil 32). Likewise, the definition in 12.1 is nothing more than a surface summary of the topic of Basil 1, and 8.6 is a simple summary of Chalcedon 11. Sometimes a little more abstraction is required – but barely. For example 12.2 is not exactly a question posed by the corpus, but it is easily prompted by the unusually schematic nature of Constantinople 7; likewise 1.4 is not the central topic of the canons at hand, but is nevertheless clearly stated therein. In all cases, the collection is more following the lead of the collected canons, than posing genuine jurisprudential "questions" to the material.

Substantive interpretation of the canons is not difficult to find, although rarely is it unquestionably significant. Most commonly a rubric might be read to restrict or expand the scope of a canon's application. For example, in *Coll50* 8 it is affirmed that the "laity" must be promoted through all the ranks before becoming bishop. The canon, however, Serdica 10, only refers to "someone wealthy or a lawyer from the agora". *Coll50* 46 likewise refers to the illicit removal of "anything ecclesiastical" from the churches. However, the canons refer to only wax, oil, silver, gold or textiles. *Coll14* 11.1 states "..that [monasteries] may not become private possessions[ἰδιωτικά]". The subsumed canon (Chalcedon 24), however, only refers to monasteries becoming "worldly inns" (κοσμικὰ καταγώγια).

Limitations or expansions of applicable subject are especially common, often a result of pasting together multiple canons with different subject applications. Thus *Coll50* 5, mostly on episcopal duties, commands that bishops care for clergy in need;

but Apostles 59, the relevant canon, had considered this a duty of presbyters too. *Coll14* 8.7, however, on the same issue, seems to extend the duty to deacons. *Coll50* 30 asserts that not only clergy but also lay people are forbidden from entering taverns; the relevant canons, Apostles 54 and Laodicea 24, refer only to clergy and lay monks (but many other canons of the same rubric do apply to both clergy and the general laity). *Coll14* 8.16 cited above perhaps extends the Neocaesarean rule from "presbyters" to "clerics".

Sometimes interpretations are hardly more than clarifications. For example, in *Coll50* 22 the very odd κατασκευὰς τυρεύοντες ("curdling schemes", "conspiring") of Chalcedon 18 is regularized as κατασκευὰς ἀπεργάζεσθαι ("effect schemes"). In *Coll14* 9.25 φυλακτήρια ("phylacteries"?) in Laodicea 36 is changed into the more generic, and probably more understandable, περιάπτοι ("amulets").

Occasionally more complex and definitive interpretative statements are made. Under *Coll50* 27 is found Basil 32: "Clerics who sin the sin unto death are demoted from their rank..." By placing this canon under a title treating clerical marriage regulations, and implicitly sexual morality, the collector has made a judgment on the meaning of this otherwise rather ambiguous Johannine concept of "sin unto death".[73] Likewise in the *Coll14* 8.1 the "τύποι" of Chalcedon 17, which are sometimes read in modern translations as "forms",[74] is clearly understood as "imperial enactments" (βασιλικοί τύποι). Extractions of asides (as in 1.4 cited above, or 1.20 cited below) in canons can also have an interpretative effect, emphasizing a rule not otherwise so prominent. One of the most dramatic examples, however, is in *Coll14* 1.3: "...that we do not have need to keep the precepts of the Mosaic law." The source canon is almost certainly intended to be Basil's letter to Diodoros (canon 87). However, this letter does not make such a categorical statement. Basil does repeat Romans 3:19, that the law speaks to those who are under the law, but his argument is subtler than the rubric suggests: a *passionate* reading of the OT law is inapplicable for Christians. The rubric is not an impossible interpretation of the letter, but it is an interpretation – possibly the boldest of its type in the collection.

Another, rather elementary, type of systematic rationalization may be sought in patterns of standardization. The "flattening" of terminology by regularizing, for example, dispositive language, is the simplest form. More complex is the

[73] Cf. the different tacks taken by the commentators, *RP* 4.173-175.
[74] For example, *NPNF* 14.280; similarly *Fonti* 1.1.83.

standardization of the form of rubrics and/or of the categories employed. The evidence for all of these is quite mixed. As to the first, in the *Coll50*, with only two exceptions,[75] all rule rubrics do use either δεῖν or simple infinitives. The subsumed canons, however, show a much greater variety, employing χρή, ἔξεστιν, ὀφείλει, ἀναγκαίον ἐστι, or third person imperatives. This is a comparatively remarkable rationalization. More often, elsewhere, the author does not standardize terms, even when it would seem easy to do so.[76] In the *Coll14* dispositives are usually omitted or left as-is in the rubrics, i.e. very diverse.

In terms of formal rubrical standardization, only the first two rubrics in the *Coll50*, cited above, evince any type of serious formulaic regularity. The many repetitions of similar rubrics between different titles in the *Coll14*, however, lend a sense of methodical rubric formation, even if still rather irregular and unpredictable.

Generally the awkward conclusion must be reached that standardization occurs in the collections somewhat, and sometimes.

A final and subtle, but potentially more far-reaching, set of interpretative problems are raised by the issue of representativeness: the extent to which the rubrics individually reflect the content of their subsumed canons, and, as a whole, convey the content of the corpus. Are certain rules marginalized? Emphasized? Caution is advisable: the history of interpreting patterns of canonical selection, compilation or emphasis according to putative ideological agendas has not met with striking success.[77] Nevertheless, a few instances of interpretative canonical selectivity may be suspected. The best example is perhaps *Coll50* 16. The title contains three rubrics: on bishop who are accused and those who may be accepted as accusers; that one who is unjustly deposed may travel to other cities; and that another bishop may not be appointed to a deposed bishop's see if the latter is still seeking an appeal. From these rubrics, one may be surprised to find that this title contains all of the Serdican and Antiochian appeal canons (3, 4, 5; 14, 15). Certainly they are not out of place here – the first rubric is so

[75] In Title 1 and 18.

[76] See for example the *Coll50*s using both ἀσκ- roots or μοναχ- roots for monastics in titles 32-34, or the retention of many different paraphrases for ordination aside from χειροτον- roots (esp. titles 7, 8, 10, 19, 36, 39).

[77] See, for example, the attempts to argue that the Apostolic canons after 50 were not included because they were "anti-Roman" (rejected in *Sources* Apostles); or the attempts to see the Slavonic translation of the *Coll50* as anti-papal (see the summary refutation in Gallagher 2002,95-100, and esp. Z□uz□ek 1967); or the lack of Chalcedon 28 in Dionysius as a statement of its rejection by the west (early eastern collections don't contain it either, as noted in *Fonti* 1.10; L'Huillier 1997,135-136); or Dionysius' supposed church-politically motivated selection in his collections (see Firey 2008,n. 34). Even western selection of Trullan canons (see Landau 1995) seems almost random, including "anti-Roman" ones, 13, 30 and 36!

general as to associatively subsume them with ease, and the third rubric is derived from the language of the Serdican canons, both in language and content. (The second rubric corresponds to another included Serdican rule, canon 18). The idea of "appeal" is also certainly present. Further, the systematic order of canonical disposition in some manuscripts makes clear that the Serdican and Antiochian canons are considered subsumed by the last two rubrics. It is surprising, however, that these canons are represented by only one very minor element of their provisions: the overly-rapid appointment of replacement bishops! Nothing is said about the Roman see, neighbouring bishops or other major procedural provisions.

Another example is in *Coll50* 23, which subsumes a number of specific regulations relating to deacons: giving communion to presbyters, sitting with presbyters, and receiving honour from lower clergy. One may also find, however, the awkward Neocaesarea 14, which limits the number of deacons in any city to seven, tucked in among the subsumed canons – it is nowhere present in the rubric. Is it being "hidden", or is this just part of a much broader phenomenon of associatively grouping various canons together without exceptional concern for exact content?

Detecting patterns of emphasis is even more difficult. The many single-canon rubrics in the *Coll14*, and the sometimes very specific rule-rubrics in the *Coll50*, may sometimes seem to suggest that special emphasis is being placed on specific canons, but the phenomenon is too varied and random to suggest real ideological patterns. Likewise it is difficult to identify any particular category of organization or type of regulation that the rubrics themselves highlight or "add" to the tradition. One exception, already mentions, is types of valid sources, in Coll14 1.2-4, highlighted through paralleling with the civil codices. Issues of valid sources are occasionally raised in the tradition, but they are certain highlighted here. If one wishes to read the systematic collections as a further "legalization" of canon law, this is the best example. *Coll14* 9.1-9, by clustering procedural rules together, with considerable amounts of quasi-technical legal vocabulary,[78] has a similar effect. Even these examples, however, are neither dramatic or sustained.

Much more broadly, *Coll14* 2-7, and especially titles 2, 5, 6, 7, might also be an example. These titles all treat more or less "sacral" matters: construction of sanctuaries, prayers, sacraments, liturgical offerings. However, as the graph above demonstrates,

[78] κατηγόρεω (9.1), καταμαρτυρέω (9.2), ἔγκλημα (9.3), δίκαι (9.5), ἀναψηλάφησις (9.6), δικάζω (9.7), κινέω παρά (9.8)

they represent very few canons. In effect, the *Coll14* is emphasizing their content by granting them more physical "title space" than they properly deserve: the *Coll14* is privileging sacral matters.

The topic of "monastics" as a separate and distinct group (*Coll50* 32-34 and *Coll14* 11) also perhaps emerges more strongly as a distinct class of persons in the systematic collections than in the source material – although "ascetics" are certainly already present as an explicit topic of legislation in Gangra and Chalcedon. In any event, in all these cases the emphases are fairly slight. Taken as a whole, there can be little doubt that the primary intention of both collections is to simply convey the traditional canonical content

To conclude, the overall impression left by the formation and constitution of the thematic rubrics, and their various relationship with the subsumed canons, is one of marked conservatism. The central "agenda" of their formation seems to be the facilitative revealing of the content of the canons themselves. The collections thus amount to little more than a basic unfolding of the traditional texts in more organized forms. More analytical and creative jurisprudential processes of thinking are not entirely absent, but their presence is tentative and desultory, almost hidden, and their function more that of amplifying, emphasizing, or suggesting: not reshaping, developing or for the most part "advancing". In this, what is not happening is more striking than what is: there is little real distillation of general principles or doctrinal concepts; there are no sustained attempts to fill in gaps; and there are no hints of harmonization. There is in short little "scientific" juristic activity of any type. The tradition is once more being treated in a very careful, almost leery way, as a highly sacred body of rules which exist to be transmitted and communicated – not modified or re-worked. The result is a very uneven, and by modern standards, unwieldy composition.

F. Order and structure in the systematic indices

The relationship between the individual thematic rubrics and the contents of the subsumed canons is only one aspect of how the thematic indices shape and digest the canonical tradition. Equally important are the larger structures and orders into which the collections shape the canonical material by the creation, selection and ordering of larger groupings of related rubrics. This type of structuring represents one of the most dramatic and obvious ways in which the collections "shape" the law.

Scholarship has not traditionally been terribly interested in these matters. As a rule, order and structure tend to excite imaginations only when they assist in textual archeology or historical reconstruction of codificatory events: for example, in recovering the original form of constituent texts, establishing the historical relationship of texts to one another, or in determining how a collection was composed.[79] Interest is much less marked in what the patterns of ordering themselves may tell us about attitudes towards law and legal thinking.[80]

The very "fuzziness" of ancient ordering is undoubtedly the main reason for this lack of scholarly interest. In much of the canonical material we may well sympathize with Mommsen's observation – made with reference to the Praetorian Edict – that what order is to be found is more of a disorder.[81] But order may be found, of a sort. We tend to seek order in neat hierarchies of comprehensive categories of internal legal concepts, with strict logical coherence among parts, completeness of presentation, and the avoidance of gaps, repetitions, or contradictions. But in Byzantine canon law, like in most ancient sources, ordering is much more superficial, oriented towards simple grouping and arrangement of surface topics. Its instincts are best captured by epithets such as loose, digressive, associative, agglutinative, irregular, and understated. Patterns and strategies of ordering are not absent, but they are subtle.

In analyzing the structures of the indices, and indeed the structures of the canonical sources which underlie them, one fact emerges quickly: almost no where can one detect the direct, sustained influence of any other *specific* schema, Greco-Roman or otherwise. As noted, Bernard of Pavia in the 12th C will directly import *Digest* rubrics and structures into his Decretal collection – creating an order that will thenceforth become standard.[82] But almost nowhere in the Byzantine corpus do we see a comparable imposition of a pre-made, external schema onto the canonical material. The one exception, already mentioned, is *Coll14* 1.1-5, but even this is not very precise, and certainly it is not sustained. It is also just possible there is a connection between the

[79] So for example, Bluhme's "masses" hypothesis, and, more recently, the wonderfully detailed reconstruction of the creation of the *Digest* in Honoré 1978,139-186. Broadly all of the structural analyses – which are most of them – emerging from and around "palingenesia" projects could be counted here. This is part of a broader legal-historical trend of being more interested in what the Roman codes preserved, and perhaps how they preserved it, than in what they *are*.

[80] However Sohm 1918, 1923 wished to see in Gratian's order a last remnant of a mentality of "sacramental" law of the first millennium. But even Zechiel-Eckes 1992, who does consider Cresconius' ordering system in depth, is too struck by its "weakness" and "inadequacy" to consider its broader legal-theoretical implications (see esp. 1.51, 61-62).

[81] Cited Schulz 1953,151 (*Gesammelte Schriften* 1.164).

[82] See the references above, n. 52. On this order's long *Nachleben*, Gaudemet 1991,171-174; in the middle ages, Fransen 1972,21; Somerville and Brasington 1998,218.

strange *Coll14* 14.1 and the equally strange opening title of Apostolic Constitutions Book 1: both are Περὶ πλεονεξίας.[83] Otherwise, when one places the structures of the canonical sources and the systematic collections against similar patterns in the Apostolic church orders, the most prominent civil material, and literary/philosophical expositions of law, direct, sustained correspondences in the grouping and ordering of material are very hard to find.[84] This is true even where patterning might be easily accomplished and/or suggested, for example in the ordering of criminal-like wrongs treated by the canons.[85]

Curiously, this lack of direct structural modeling is also evident *within* the canonical tradition. The thematic indices do not show any clear evidence of trying to follow the order of topics found in, for example, Laodicea, or the Apostles, or of each other. Even the second-wave material (generally much more tightly structured than the first wave), does not show any strict or sustained dependence on the structures of the thematic collections. This is true even where we might expect it, most notably in the structuring of the very large and code-like Trullo – a council which seems to be following the *Coll14* in its selection of sources, but, it seems, in no other way.[86]

Nevertheless, if specific and sustained instances of modeling are difficult to find, general resonances and broad parallels are everywhere. This is first and foremost true within the tradition itself. Indeed, the single most important aspect of the 6th C systematic indices is that in the subject-groups formed, and the general ways of ordering and relating these groups, almost everything in the systematic indices has some precedent somehow, somewhere, within the earlier canonical sources themselves. The two cannot be treated separately. The pattern of deriving content from the corpus, instead of imposing it upon it, is thus evident also in the provision of structure and order. The systematic indices do not represent any radical innovations in ordering or shaping the material: they mostly emphasize and amplify patterns already present.

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[83] Text at Metzger 1985,1.100.

[84] The text structures and orders taken into account for this comparison include samples from a wide, if not exhaustive, survey of the relevant literature. For details, see Appendix D (4).

[85] For example, the progression through criminal-like material in *Coll50* 40-46 and *Coll14* 9.25-27; 13.20, 23 does not follow the progression of the exposition of crimes in *CTh* 9 or *CJ* 9, *Digest* 48, *Institutes* 4.8 or Plato *Laws* 853d-910d (i.e. books 9[-10]).

[86] I.e. the order of topics addressed, or the order of older source canons, in no way follows the order of any of the topics or sources in the *Coll50* or *Coll14* indices. To give an example, if the Trullan canons were to follow the order of the infractions in the "clerical code" of *Coll14* 9.20-39, they would be in the following order: 67, 12-13, 61, 50, 24-25, 66, 10, 3-5, 92, 77, 9, 34, 102. Only the last canon (102) and chapter (9.39), on repentance, correspond.

Thus, to look just at groupings, the systematic collections tend to create a group for ordination material (*Coll50* 1-12; *Coll14* 1.6-28) – so already Apostolic 1-2, 76-83, Ancyra 10-13, Neocaesarea 8-12; likewise they create groups for heretics, Jews and pagans (*Coll50* 37-39; *Coll14* 12), as already in Laodicea 29-39; or for procedure and penalties (*Coll50* 15-19; *Coll14* 9), as in Serdica 3-9 (with 3-5 specifically treating appeal), as also numerous times in Carthage (8-15, 27-30, 104-107, and 128-133), Antioch 11-15, and even Apostolic 74-75; or for liturgical, sacramental and ritual matters (*Coll50* 46-47, 50; *Coll14* 2-7), as Apostolic 7-11 (paralleled in Antioch 1 and 2) or 69-73, Laodicea 43-52 (indeed, much of 20-52) or Carthage 3-7; or for marriage, women, family and/or sexual matters (*Coll50* 41-44; parts of *Coll14* 13), as in Ancyra 19-21 (maybe from 16), Gangra 13-17, Basil 3-7, Chalcedon 14-16 and much of Basil's second letter, especially 21-27, 30-42, 48-50; or for murder, sorcery, augury, violence, and theft (all broadly "criminal" matters", as *Coll50* 40-46 and parts of *Coll14* 9 and 13), as in Apostolic 21-27, Ancyra 22-25 or Basil 54-66 (perhaps 54 to 83).

Resonances and parallels for these groupings, if not direct derivations, may also, however, be felt in material outside of the canonical sources. "Criminal" sections, for example, are frequent; [87] procedural sections are not unusual;[88] marriage and family topics likewise often form common groups;[89] and cultic and "sacred" matters often cluster together.[90] More immediately, works addressing specifically Christian matters can group, for example, heretics, pagans and/or Jews together.[91] Others could easily be found.

The patterns of ordering within the systematic indices are also not in any way exceptional. Both within and outside of the corpus many resonances may be found.

Three ordering strategies may be remarked as particularly prominent – although all are sporadic, uneven, and often broken by digression.

The most obvious, and the dominate pattern, is the tendency to build structure around a hierarchy of personal subjects and/or personal statuses or offices. This

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[87] See above n. 85. We may also the second half of the Ten Commandments, Josephus *Antiquities* 4.266-291, and the second half of Philo's *Special Laws* 3-4 (as following the order of the second half of the Ten Commandments; esp. those laws attached to 7, 8, 9).
[88] E.g. *Institutes* 4; *CTh* 2; *CJ* 2-3 (broadly); *Digest* 2-3 (or to 5); Athanasius *Syntagma* 4-5 (ed. Simon and Troianos 1989); Josephus *Antiquities*; 4.214-222.
[89] E.g. Plato's *Laws* 772d-785b; *CTh* 3; Athanasius *Syntagma* 10-11;Philo *Special Laws* 2-3 (i.e. Ten commandments 5, 6); Josephus *Antiquities* 4.244-265.
[90] E.g., the Ten Commandments 1-4; Deut. 12-13; *Didache* 7-10; *Canons of Hippolytus* 19-38; Plato's *Laws CTh* 16; *CJ* 1.1-13; Philo *On Special Laws* 1-2; Josephus *Antiquities* 4.199-213 (and broadly book 3).
[91] *Apostolic Constitutions* 6; *CTh* 16.5-10 and *CJ* 1.5-11; Athanasius *Syntagma* 3.

structure, usually near to the beginning of a collections, finds easy resonance in the many *Amtsweisungen* of the secular literature, and is also very prominent in some Apostolic church order material.[92] In the canonical material, the most obvious example is the *Coll50*, especially Titles 1-39 where the topics proceed down the scale of clergy, laity, monastics, catechumens, schismatics and heretics. The descending hierarchical progression within these titles is made all the more noticeable by a tendency to place the subject very early in the rubric (in emphasis below), which makes the sense of slowly stepping down the hierarchy quite palpable. The following table of rubrical *initia* demonstrates this sequence.

Titles	Rubrical *initia*
1	Περὶ τῆς ὁρισθείσης τοῖς **πατριάρχαις** ἐκ τῶν κανόνων...
2	Περὶ τῆς ὁρισθείσης τοῖς **μητροπολίταις** ἐκ τῶν κανόνων...
3, 5, 6, 7, 12, 14, 15 [16], 19	Περὶ τοῦ δεῖν [or μὴ δεῖν] τὸν **ἐπίσκοπον**...
20	Περὶ τοῦ μὴ δεῖν **κληρικοὺς**...
21	Περὶ **χωρεπισκόπων** καὶ **πρεσβυτέρων**...
22	Περὶ τοῦ δεῖν τοὺς **πρεσβυτέρους** καὶ πάντας τοὺς ἐν τῷ **κλήρῳ**
23	Περὶ τοῦ **διακόνους** μὴ δεῖν...
24	Περὶ χειροτονίας **γυναικῶν**...
26	Περὶ τοῦ **ψάλτας** καὶ **ἀναγνώστας** καὶ **ὑπηρέτας** καὶ **ἐπορκισάς** ...
27, 28	Περὶ τοῦ μὴ δεῖν **ἱερέα**...
29-31	Περὶ τοῦ μὴ δεῖν **ἐπίσκοπον** ἢ **κληρικὸν** ὅλως ἢ **λαϊκόν**...
32-34	Περὶ τῶν **ἀσκούντων**... **ἀσκητὰς** ... **μοναχῶν** καὶ **μοναστριῶν**...
35, 36	Περὶ **κατηχουμένων**... Περὶ τοῦ μὴ δεῖν τοὺς ἄρτι **φωτισθέντας**...

The progression is not, as ever, exact or mechanistic. Thus we might have expected 20 to follow 22; but the topic of 20 is a close continuation of 19. Similarly, 27 and 28 should seem to have been placed after 22, but the introduction of clerical marriage at the end of 26 (and the transitional function marriage plays into 29 and onwards) seems to have attracted both of these titles to their current place. The deviations may thus be explained through processes of digression.

In a more disjointed way, a similar pattern is evident in the *Coll14*, first in Title 1, which roughly proceeds down the scale of clerical offices, and then after a long

[92] Such structures are well known, and very common, in early codes and code-like literature. Solon – or at least the BC403 Athenian "code" – is sometimes suspected of it (see the discussion, and doubts, in Ruschenbusch 1966,27-31); Plato assumes it (*Laws* 734e; cf. Gagarin 2000,218), Cicero does it (*Laws* Book 3), and it is broadly true of Dionysius of Halicarnassus' account of Romulus' legislation (*Roman Antiquities* 1-29, ed. Jacoby 1885; part of a broader tendency, I think, of treating "constitutional" matters first). It is very evident in the first parts of *CTh*, *CJ*, *Digest*, *Eisagoge*, *Basilica*, and strongly present in many examples of the Apostolic church order material, for example the Apostolic Tradition texts, the *Constitutiones ecclesiasticae apostolorum*, or the *Didascalia* (and thus the *Apostolic Constitutions*). The introduction to the *Eisagoge* even includes an elegant rationale for this structure: see lines 91-94 (ed. Schminck 1986,4-11). It is also quite evident in *NN.* 123 and 131.

liturgical/sacral interlude (Title 2-7), with titles treating (mostly) disciplinary matters related to bishops and clerics (8, 9 and 10), then monastics (11), heretics and other marginals (12), the laity (after heretics!), (13) and "all men" (14).

Many corpus sources show some traces of this type of ordering. In the first wave it can sometimes emerge rreasonably clearly, as in the Serdican canons, which are neatly divided between regulations treating bishops (1-12) and those treating clerics in general (13-19), or in Ephesus 1-4, where one "steps down" through metropolitans, bishops and then clergy more generally. Similarly Laodicea 20-28 are fairly obviously focused on the clergy while 29-39 are notably more general in scope (with no subject or addressed to "Christians"). Elsewhere such an order may be perceived more dimly, or more briefly. Apostolic 1-59, for example, are mostly focused on the clergy, while much of the rest might be seen as a little more general in scope (although 76-83 represents a clerical reprise); Nicaea broadly works from clerical ordination and episcopal matters (1-8) down to more general or varied questions, and clerical, lay and catechumen lapsi treated in that order (10, 11, 14). Neocaesarea 1-4 treats the marriages of clergy (1), then lay people (2-4).[93]

In the second-wave sources such patterns become more regular and obvious. II Nicaea moves (with some digressions) through emphases on bishops (2-7), clergy generally (10-16), and then monastics (17-22). Protodeutera, curiously, is reversed, moving from monastics and monasteries (1 to 6, or perhaps 7), up to clergy in general (7 or perhaps 8 to 12 or perhaps 13), and then on to bishops (13, or perhaps 14, to 17). Even the brief Hagia Sophia proceeds distinctly through primates (1), bishops (2), and then laity (3). Trullo is exceptional in the corpus for containing actual topical rubrics within its own canons, which are in a hierarchical series: περὶ ἱερέων καὶ κληρικῶν before canon 3, περὶ μοναχῶν καὶ μοναστριῶν before 40, and περὶ λαϊκῶν before 50.[94]

The second, and often vaguer, major structuring pattern is a hierarchy of substantive topics. Also evident in non-canonical material, this manifests most regularly in a tendency to place higher status matters of faith, general legal "doctrine", clergy, and anything sacral near the beginning, and material that might be considered lower status material near the end (although the *very* end will sometimes "recover" with

[93] Similar patterns may be discerned in Ancyra, Neocaesarea, Antioch, Chalcedon, Serdica, parts of Carthage and Basil, and Peter.
[94] These rubrics represent something of a textual mystery, and it is not entirely certain that they are original. See Appendix D (5).

higher status material again).[95] Thus in the *Coll14* faith, clergy and sacral matters clearly dominate the first half of the collection (Titles 1-7), while the more mundane management, finances and "criminal" matters all emerge in the latter half, along with more neutral topics on lower-status persons. Within the *Coll14* titles, a diffuse tendency in the same direction may also occasionally be noted.[96] In the *Coll50* matters likewise get palpably more distasteful after about Title 36, where one starts to discuss, schismatics, heretics, lapsi astrologers/diviners, murder, fornication, marriage(!), aberrant sexual practices, thieves perjurers, and sacrilege.

In the corpus sources, this pattern is most evident in the tendency to place faith, faith-like and general questions about the canons very early, as in Constantinople 1, Chalcedon 1, Carthage 1-2, Trullo 1-2, II Nicaea 1 (and 2). Sacral and liturgical matters also tend towards first-position, as Apostles 1-9 (roughly); Antioch 1-9; Dionysius 1; Timothy 1-10, Theophilus 1 and 2; and II Nicaea 2-6. Likewise, matters treating more "criminal" matters, sexual matters, administrative and financial matters, or heretics/pagans, tend to come later, as Ancyra 16-25, Laodicea 29-39, much of Antioch 10-25, Timothy 11-15, II Nicaea 8-16.

Another important material hierarchy can also be found in the growing or diminishing seriousness of offences, as for example in *Coll14* 9.10-18; *Coll50* 39 onwards; the corpus' two main treatments of lapsi, Ancyra 1-7 and Peter 1-14; and Gregory Thaumatourgos 1-8, which moves from less culpable actions to more culpable actions (especially if canons 3-5 are read as an appendix to canon 2).

Interestingly, some of the most common exceptions to the substantive hierarchies seem to follow patterns – almost traditions in themselves. One of the most prominent is a tendency to return to certain types of liturgical or sacral material – "high status" matters – at the very end of a source. Thus, various liturgical matters appear in the last title of the *Coll50*, as they do in Nicaea (18-)20; Gangra 18-20; Laodicea 14-19 (the end of what is often thought of as "first" Laodicea, from 1-19), and also the very end of Laodicea, 58-59; and Peter 15. The canon of Scripture is also mentioned last in the *Coll50*, just as two listing of the content of Scripture, Apostolic 85, and Laodicea 59, occur at the very end of their sources. Finally, a general canon/rubric on repentance

[95] There is a great deal of variation in the patterns of substantive ordering in the non-canonical literature consulted, but it is fairly common to find, for example, more sacral and general theoretical matters, or matters pertaining to the offices of the great, first, and then more distasteful criminal, sexual or mundane financial administrative matters later. See Appendix D (6).

[96] For example in Title 3 matters pertaining to demoniacs (13), heretics and Jews (14-15, 20), menstruation, nocturnal emissions and sexual impurity (18-19, 21), and suicides (22) are clustered near the end. Similar patterns are perhaps evident in Titles 4, 6 8, 12.

may be found at the end of Basil's third letter (canon 84), at the end of title 9 of the *Coll14* (chapter 39), and at the end of Trullo (canon 102).

One other exception also follows a pattern: marriage-related canons begin many of the oldest sources. So, very directly, Neocasarea (1-3), Gangra (1), and Laodicea (1). Similarly, if we except Ancyra 1-9 as a "special" section on lapsi, Ancyra's "general" portion also begins with marriage canons (10-11). Likewise, after two general canons on the faith, Carthage begins with marriage (3-4). The Apostolic canons, after their initial ordination pair (1-2), and liturgical-altar pair (3-4), also move directly to the matter of clergy and their wives (5). This may be related to the next tendency.

The third tendency, and the most subtle, is to proceed through a "life order", i.e. to move through material in the order in which the topics would arise chronologically. Fairly well known in the later Byzantine legal sources,[97] it is very sporadic in the canonical literature. It may be dimly felt in the beginning of the *Coll50*, where in title six (possibly this should be extended back to four, with five as an associative digression) one begins with matters relating to the death of a bishop, and thus a vacancy. Then one moves to the manner in which a new bishop is to be elected (7), the time limit for the election and qualifications of new candidates (8-9), and finally a set of typical problems of ordination itself (10-12). The remaining titles all treat matters to be encountered once ordained. In *Coll14* 4 the chapters move through accepting one to the catechumenate (1); questions of catechesis/ἐφορκήσις once one is in the catechumenate (2); how one actually performs the ritual of baptism and how the candidate must confess the faith at the baptism (3-4); and then problems with particular types of candidates (5-10). In effect, one has moved from pre-baptismal to baptismal problems. Chapters 11-14 then passes to logically post-baptismal issues: chrismation, rebaptisms, and reception of heretical baptisms. (Chapters 15-16 returns to problems with candidates and catechumens, breaking the order – however, this section, entirely derived from Timothy, may be reasonably understood as an appendix, tacked on.)

Such orders may be occasionally suspected in the canonical sources. Such a progression can be felt dimly underlying Antioch 17-25, a series of rules governing

[97] So Burgmann 1983,7-8 on the order of the *Ecloga*. It is never terribly well defined, but the *Prochiron* and *Eisagoge* likewise broadly move through matters of the beginning of (civil) life, i.e. marriage, then to things during life (buying, selling, partnerships), then to matters relating to the end of life (inheritances, legacies). The *Eisagoge* is even quite self-conscious about this structuring – see its Prooimion 95-107 (Schminck 1986,4-11). It may also be perceived dimly in some Apostolic church order matter, for example in the *Constitutiones ecclesiasticae apostolorum* material, with the progression through catachesis, baptism, eucharist, general prayer, and finally funeral matters (the *Basilica* and Plato's *Laws* also ends with funeral matters). See also *Laws* 721a on codes following the "order of nature".

clerical, mostly episcopal behaviours, and that otherwise seems to have little structure at all. Thus we begin with matters relating to the ordination of new bishops (17-19), then move to behaviour of bishops as bishops, especially with regards to other bishops and sees (20-22), and then finally end with matters of succession and finance that pertain to the end of a bishop's life (23-24, with 25 as an extension of 24). Even more vaguely, this pattern might underlie the peculiar opening structure of Nicaea: canons 1-2 treat problems relating to candidates for ordination, canon 3 on the συνείσακτοι intrudes as an exception (possibly associatively aimed at potential candidates), 4 treats the actual ordination of bishops, and 5-7 the consequent relations of bishops with each other. More clearly, in Protodeutera 1-4, one moves from the construction of new monasteries, (1) to the reception of postulants to monasteries (2), to problems encountered with those who have become monks (3-4).

Aside from these three major tendencies, one last pattern – or almost non-pattern – must also be noted. We may call it the "miscellanizing" pattern. It reveals itself in the surprisingly common pattern, evident in the secular literature as well, of proceeding from greater order to less order – with order sometimes recovering at the very end of a source.[98] What "order" means may vary: perhaps clearer and more distinct hierarchies, more coherent and larger topical groupings, more methodical categories, or more precise rubricization. Often it emerges across a source as simply the gradual descent into more random and ill-ordered matters. This is evident across the entirely of both the *Coll50* and *Coll14*, both of which begin quite distinctly, with organized and distinct rubric-groupings, but then gradually become more and more vague. In the *Coll14*, for example, faith and sacral matters are divided into seven fairly precise titles which only subsume about a quarter of the collections references, and quite accurately and in great detail relay the canons' contents. But clerical disciplinary problems then get divided into only three titles; monastics, heretics, and, especially, laity, into only one each; and finally, the last title, Title 14 Περὶ κοινῶν πάντων ἀνθρώπων seems to function as something of a miscellaneous catch-all. In effect, the author seems to have become less ambitious and detailed in his rubricization and categorization as he continued. Within the *Coll14* titles this pattern is also often evident. Thus, for example, 1.1-15 exhibits considerable structure, even imitating the Codex; but 1.16-38 much less so, often without any sense of structure, or even coherent subject sub-groupings. So 8.1-8 is

[98] Broadly almost every external legal source examined, for varying reasons, is more ordered, logical, and structured in its very beginning than its later sections. See Appendix D (7).

loosely centered on clerical travel, but 8.9-19 feels almost random. Likewise title 12 begins with a fairly clear introductory section treating initial definitions and "heretical books" (but here a kind of "faith" matters it seems); this is then followed by a fairly clear sacral section (6-12), treating chiefly ἀναφοραί, entering churches, and praying together; the rest of the title is then much more miscellaneous. The *Coll50* is likewise most organized and regular in the first 40 titles or so, with regular hierarchical progression, and fairly large groupings of related items. Then titles become much more specific and progress with less logic (40 murder; 41-44 fornication, marriage, aberrant sexual practices; 45 thieves and perjurers; 46 removing items from church; appropriate offerings; 47 liturgical matters; 48 canons and repentance; 49 synods; 50 prayers, times and calendar).

In the corpus such "miscellanizing" is also often evident. Thus one can detect more structure and logic in Apostolic 1-15, with its movement through ordination, altar service, communion, association with excommunicates, and letters for excommunicates than the rest of the text, with its movement through marriage, surety, self-mutilation, criminal activities, marriage again, physical violence, liturgical actions of deposed clerics, and simony, clergy rebelling, episcopal and synodal rules, dice, usury, baptism, eating in tavern, and so on. Ancyra begins with two comparatively developed and defined sections on lapsi and ordination, 1-9 and 10-13, and then moves quickly through a kaleidoscope of other topics: abstention from meat, property of widowed churches, bestiality, reception of bishops, women and sex, murder, sorcery, and rape. The first section of Carthage, 1-33, likewise begins, despite some digressions, with relatively coherent groups of canons on faith (1-2), sacramental matters (3-7), and then dispute resolution (8-15); from 16 onwards, however, the canons become much more mixed, running through clergy and guardianship, reader marriage, clergy lending money, readers saluting the people, a primate for Mauretania, ignorance of the law, and so forth. Trullo starts with its very organized introductory canons and then a fairly coherent group on marriage and sex, but then loses almost any sense of order. II Nicaea also loses much coherence after about 16 (aside from the general monastic theme). Many other examples could be offered.

Aside from these structures and patterns, more sophisticated, but isolated, structural schema can very occasionally be found. The most extraordinary example is Gregory of Nyssa's canonical letter, the only truly systematic *aperçu* of church law in the Byzantine corpus – and indeed, perhaps in the entire Byzantine canonical tradition.

Using systematic medical τεχνή as his explicit model (ὡς δ' ἂν γένοιτό τις τεχνικὴ μέθοδος)[99], and proceeding through a branching processes of *divisio* and distinction, and with considerable concern for definition, Gregory creates a scheme based upon the common tripartite division of the soul's faculties: intellectual, desirous, and appetitive. Various different types of canonical infractions are carefully classified into each group, and sometimes further subdivided through analysis of their intention or other circumstance. Distinctions drawn include that between involuntary and voluntary actions, the level of coercion, whether one has turns oneself in or not, weaponry involved or not, and the degree of harm done. At least one set of definitions is also established through an abstract analysis of effect: fornication and adultery are defined as, respectively, sexual acts which do not harm another, and those that do.

Gregory thus provides an abstract of categories and distinctions – largely external to the canons – for comprehending and inter-relating the entire system. Further, the classification into these categories requires the analysis of different infractions according to a set of underlying concepts (i.e. not surface topics), in this case primarily types of psychological error.

Even more remarkably, but very characteristically of truly "systematic" approaches to law, the system serves to reveal gaps in the existing legislation, as well as to challenge the consistency of existing concepts. Both occur because of the internal comparisons implied by the system-building. The first appears when Gregory notes (in canon 5) that, to his surprise, only one appetitive sin, murder, has been addressed at length by the fathers – despite the fact that other actions could be also considered appetitive (hitting, blasphemy). His categories have revealed/created an inconsistency in the received penitential tradition. The second occurs when Gregory observes (canon 8) that the traditional punishment for sacrilege – a crime punishable by death in the Old Testament, he notes – is lighter than even the punishment for adultery. His systematic treatment has forced a comparison of penalties. In both cases the systematic shaping of the material is thus encouraging substantive critique – and thus pointing to the "advancement" of canonical regulation.

Despite its sophistication, however, in the perspective of the entire tradition, and the thematic indices in particular, the most remarkable aspect of Gregory's system is its almost total lack of influence on the later tradition. It is no where taken up as a model to be followed: it is simply one more item in the traditional pool of rules.

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[99] *Fonti* 2.205.13-14

Another, less dramatic example may be found in *Coll14* 9, on clerical infractions, which, despite the relative disorder of the material after chapter 20, may nevertheless be regarded as among the most sophisticated structures in the Byzantine canonical traditional. In effect, a very disparate set of material has been organized into a quasi-procedural order – a kind of specialized "life-order". The first eight chapters thus move through the steps of ecclesial actions, beginning with accusations against bishops (1-3), then trials themselves (5), and then retrials (6, and perhaps 8). (The technical ring of these chapters is amplified by the high concentration of typical legal terminology.[100]) The title then moves to a set of unusually general rubrics on the types of punishments that might be imposed during such trials, broadly proceeding from least severe to most (10-19). The last half of the title (20-38) then treats all of the particular crimes treated by the canons, thus forming a type of substantive complement to the procedural beginning. Finally, the whole concludes with a very general reflection on repentance, chapter 39, that is, what one is to do once one has committed any of the foregoing crimes and been assigned a punishment. The overall structure suggests a kind of mini criminal code for the clergy.

Even this structure, however, is implicit. Ultimately this title is still doing little more than manipulating fairly simple summary rubrics into a vaguely more structured whole.

The basic mechanism – the "how" – of Byzantine structural ordering thus remains highly limiting: one can build structures only by clustering topics of similar external content, and then placing these groups, almost always roughly, into a slightly more logical schema. Moreover, this method is often strangely associative, with connections made through similar, sometimes only vaguely similar, surface topics or simply similar phrases,[101] and with a strong tendency towards digression. It often seem almost opportunistic: connections are made mostly when easily made. It seems to resist deeper internal analysis.

It is interesting, however, that when allowance is made for the associative nature of this structuring, a very tenuous pseudo-structure can emerge for parts of the material that otherwise seem to have very little obvious progression, and odd breaks or

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[100] See above n. 78.

[101] This is very often remarked in the literature on ancient law. Tigay 1996,449-459 is one of the best treatments, with discussion of other ancient near eastern sources, and many further references; see also Diamond 1950,23-31 on Hammurabi; Honoré 1978,174 on the *Digest*, the *Edict* and Ulpian; Mordek 1975,23 on the *Vetus Gallica*; Schulz 1953,151 esp. n. 6, on the *Edict*, with further references; and Willetts 1967,34 on Gortyn.

transitions are sometimes explained. An example of this last may be found in Ancyra 10, 12, and 13, a loose grouping of canons treating aspects of ordination. Canon 11, however, treats betrothed girls who have been seized by others for marriage, and seems to break the grouping. However, this break should almost certainly be understood as an associative digression from Ancyra 10, which treats the status of ordination of deacons who have or have not made clear their intention to *marry* at the time of their ordination. The general matter of ordination is simply resumed in canon 12.

Sometimes association can be even vaguer, perhaps unconscious. An excellent example is an associative "chain" threading through Apostolic 69-73, a cluster of canons vaguely centered around feasting/holy places/behaviors interior to holy places. (The "chaining" concepts are in boldface.) Canon 69 opens with the topic of **fasting** during Lent; the next canon then moves to **fasting** and **feasting** with Jews; the next, taking **oil** into Jewish synagogues during their **feasts**; the next, taking **oil** or wax out of the "**holy** church"; the next using any **sanctified** thing (i.e. out of a church) for one's own use. The progression develops through the associative chain fasting – feasting – Jews/oil – "holy" item.

More often transitional or "hinge" associative canons (or rubrics) may be noted, in which a canon contains some type of topical association with both preceding and succeeding groups of canons.[102] For example, in Laodicea 49-54 four Lenten regulations (49-51) merge smoothly into two marriage regulations (53-54) through a regulation (52) that treating marriages during Lent. Or in II Nicaea, canon 7 functions to connect the "episcopal" section of 2-7 and the false belief/religion section of 7-9 by stating a rule that overlaps with both: the consecration of churches (an episcopal task) must be accomplished with relics, contrary to the heretical iconoclastic view. In some sources, such associative transitions can be quite pronounced, running almost the entire length of a source.[103]

Such loose, semi-conscious associative structuring does not, however, provide much "order" or structure by modern standards of rational systematization, and they are difficult even to detect. They in fact point to what is perhaps one of the most important characteristics of Byzantine structural ordering: its absence. Very frequently in Byzantine sources, and even in the systematic indices, there is simply not much order at all, and what does occur tends to be sporadic, localized and elusive. Order tends to

[102] A phenomenon remarked in Tigay 1996,449-450.
[103] Most notably in Neocaesarea, much of Antioch, II Nicaea, and much of the *Coll50* (perhaps also through *Coll14* 2-7).

emerge occasionally, and somewhat gingerly, and roughly, and it can be difficult to determine how conscious a structure really is. Rarely is ordering highly sustained across the entirety of a source, or in exactly the same way. Indeed, lest the above examples mislead, in the canonical sources themselves, but also in the indices, large stretches can exhibit virtually no order at all. Both Chalcedon and Trullo, for example, but also much of Basil and Carthage, show very little internal order; Nicaea is also very vague. Only with difficult can one tease much structure out of *Coll14* 12 and 13 (despite some coherent subject groupings), and large parts of titles 1, 8 and 9 seem almost random; even the *Coll50* hardly constitutes a uniformly organized whole, with predictable and consistent categories and forms. Its last half is particularly jumbled. One of the key "methods" of canonical ordering is thus a non-method: you *don't* structure and order much.

To conclude, the overall shape of order and structure in the systematic collections, as in the canonical sources themselves, is mostly sporadic, "thin" or just plain simple. Like so many other aspects of Byzantine canon law, it is highly "exegetical", strongly attached to and reflecting the surface content and contours of the canons themselves, and showing little interest in sustained rationalization or abstract conceptual analysis – despite the occasional exceptions that demonstrate that such analysis was indeed possible.

G. Summary and analysis: systematizing the law?

The first, and in many ways definitive, attempts of the Byzantines to "systematize" their canonical corpus do not much impress. They are ultimately little more than topical indices whose principal goal is to aid in the finding of canonical texts on particular matters: tools of "law-finding" in its simplest sense. In their self-presentation, selection among their sources, creation of rubrics, and structuring of topics they show little inclination towards juridical abstraction, systematic creativity or interpretative courage: they rarely "advance" the law in any obvious or dramatic way. Even creative topical formation or distillation is surprisingly rare. The creativity and abstraction they do evince is more on the level of emphasis, an occasional nudging of the tradition – but it is revealing that such instances need to be searched for, often with some difficulty, and it is not always clear how intentional they are. Even imitation of the secular codices is no where overwhelming, if not completely absent. The real point of these works seems to be encapsulated best in a phrase such as "surface summary": the collections provide a

helpfully organized summary of the surface contours of the canons. Juristic abstraction and systematic rationalization are not priorities.

Such a method clashes directly with modern expectations for legal systematization. Legal systems are supposed to be internally consistent gapless wholes: all rules, neatly defined and conceptually clear, are to relate seamlessly to one another in a clear and predictable mechanism of internal logical coherence, and when a rule does not exist to address a certain situation, then the system is supposed to itself aid in creating one. The Byzantine systematic indices, however, do not engage in even the precursor tasks to such systematization: casting canon law as a series of problems to be solved (gaps to be filled, contradictions to be resolved, obscurities to be removed – as in Gratian, or even the late antique secular codification projects) or the distillation of common concepts and principles. They do not even present the law as a synthetic and digested whole as the *Institutes* do, nor do they evince the sustained doctrinal thinking of the *Digest* fragments.[104] More disturbingly, all of this is true despite the fact that they are created in a society, and during a period, with many resources and models for far more penetrating systematic and analytical thinking (again, the *Institutes* and *Digest* themselves are good examples, but the works of the Aristotelian commentators and Neoplatonic and rhetorical pedagogical manuals also come to mind). Indeed, in texts such as Gregory of Nyssa, the tradition reveals its own ability to think in an abstract systematic manner. Yet, as a whole, the tradition never moves in this direction. This curious disregard for more sophisticated and technical jurisprudential systematization mirrors the odd place of technical formalist discourse in the canon themselves: it is present, known, and even possible, yet somehow not central. It is not the controlling concern.

If we are not too quick to condemn these texts to the narrative of "primitivism", it is possible to discern a certain legal logic and coherence behind the observed phenomena. The key may be in realizing that, from a phenomenological perspective, the central action of these texts – what they are "doing" – is bringing one into closer and easier contact with the canonical texts themselves, and in a fairly physical way, i.e. they are always bringing one as close to the actual textual contours of the canons as possible.

[104] Neither of which, of course, do either task particularly well by modern standards. On the inner "flow" of the *Digest* titles, Stolte 2003,89; Pieler 1997a,581; cf. also Pringsheim 1921,441 on the secular Greek scholiasts' concern for ἀκολουθία. But on the general lack of internal systematic coherence in even the ancient secular codes – something of a commonplace – see especially Hezser 1998,629-631; also Bretone 1999,397-398; Gaudemet 1986; Schulz 1936,53-66; Westbrook 1988. We do well to remember that it took the medieval glossators and commentators centuries to pull an internally coherent *usus* out of the *CJC*!

Thus these collections do not select much among their sources; their rubrics do not stray far from the texts themselves; and the arrangement of the texts hardly pushes beyond very simple and conventional patterns evident in the structural shape of the canonical sources themselves. The texts are, in short, not trying to lead one "beyond" the canons themselves, or to construct a doctrinal world into which the canons might be fit. They are not creating "canon law". They are instead directed towards facilitating engagement with the original texts themselves, "the canons", whatever their state or content might be. To borrow a turn from Zechiel-Eckes, they are deeply, and intentionally, *transparent* to the canonical corpus.[105]

This priority makes very good sense if we recall that the "law" truly is first and foremost conceived as a quasi-sacred body of traditional material that has its basic locus in the physical texts of the *laws*, in the concrete plural. Any movement away from, or any jurisprudential violation of, these laws is naturally avoided, and almost nonsensical. Certainly any aspect of systematization that might suggest radical structural change of this material is mostly avoided. As a result, juridical rationalization, and other types of systematic development, if not entirely absent, take on a rather different cast. They appear as occasional and tentative suggestions, mostly around the margins, and very much trying to shape themselves to the shape of this sacred body of material. In overall structure, in particular, the level of organization evident in the collections is only a very slight step up from leaving things as they fall: the priority remains the adherence to the surface contours of the legislation. Order and system thus seem to be striving to appear only on the terms of the canons themselves. At best a general coherence with the broader world of legal ordering is found, perhaps occasionally verging on imitation. But strong, reconstructive juristic manifestations of systematic rationalization are neither much evident nor to be expected.

The assertions of "system" that are present are therefore mostly very diffuse and symbolic in character. Thus, for example, the shaping of the material into various hierarchies of offices and topics does assert a *symbolic* sense of systematic comprehensiveness: the rules stretch from one end of the cosmic world-order to another, and are a natural part of this quasi-sacred order – and must be read in this way. In this, there is even an implicit assertion of the canons' internal coherence, but it is not an internal juristic one: the canons are instead "internally coherent" with the whole cosmic order!

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[105] Zechiel-Eckes 1992,1.37.

More specific "messages" may also be read from these structures. For example, canonical order must emerge from rightly-ordered hierarchical officials; disciplinary measures are subordinate to faith issues; and some matters are more shameful than others. But these messages are not juridical-doctrinal in form or intent. Instead of trying to create or refine a proprietary (and autonomous) set of legal doctrines, the intention of this type of symbolic systematization is – once again – to inscribe or embed the canons into a broader metaphysical narratives or "systems" of order. And once again, even in the area of systematization, law and legal practice is thus oriented less towards "getting right" a thorough and consistent application of rules to facts in a specialized and self-perpetuating technical discourse, as "getting right" a much broader and general world of traditional social and ideological ordering into which the canons are meant to be read and applied.

CONCLUSION

We may now return to the question of what a close reading of the central texts of the Byzantine canonical tradition 381-883 reveals about the "the fundamental perceptions, categories, values, expectations, assumptions and structures that constituted the intellectual and cultural framework of Byzantine canon law " – in other words, what they reveal about the nature of law and legality in the Byzantine canonical collections.

Out of the many details and observations made in the above analyses, a coherent picture has slowly begun to coalesce.

In chapter one, the broadest "shape" of the law – its physical structures and patterns of growth over time – revealed a legal world built around a surprisingly unitary and stable body of traditional texts. Byzantine canon law is above all the story of the development of one more or less unified collection of texts that slowly grows through the accumulation of sources in a succession of corpus "cores". In this world, patterns of real diversity and radical system-wide re-hauling are nowhere in evidence. Instead, the *leitmotifs* of the system's growth are conservation and accretion as newer traditions are piled on top of older ones, and gradually themselves accepted as part of the core corpus. Nothing is ever lost or permanently ejected from the tradition: once "in", texts are quite eternal.

The process of definition or demarcation of valid sources emerges as quite curious. On the one hand, "the canons" always have a fairly concrete referent. The type of uncertainty that will apparently prevail in the western tradition before the 12th C will never occur in the east: everyone always knows what at least the "core" corpus of canons is, and if anything this certainty increases over time. At the same time, however, the *precise* definition of the corpus is always elusive. The "edges" of the core are ragged and permeable.

This uncertainty is related to an apparent lack of any clear expressions of "sovereign" authority *over* the tradition. Such authority is never something that any one (living) agent ever manages to exercise in order to construct or reconstruct, or even definitively define, the tradition. Instead (as also evident in chapter two), authorities at best add material, index material, confirm material or clear up some particular problems "around the edges". Those that seem to come close to "officially" defining the tradition, like Trullo 2, do not seem to have the effect they should, at least not until they themselves are well established as part of the tradition. Their function is prototypically

more to *confirm* the existing tradition than definitively define it. The result is that the tradition never achieves an absolutely clear definition of itself.

This curious leeriness about expressions of positive authority over the tradition has a counterpart in the surprising absence of any type of sustained jurisprudential literature – and a class of legal professionals to produce it. Although it is clear that such jurisprudential handling of the rules is taking place, this never develops into a substantial literature in our period, or an important focus of the system as a whole. Byzantine canon law thus does not develop itself primarily as a jurisprudential "project": no attempt seems to be made to develop a coherent doctrinal architecture of "secondary rules" to govern the interpretation and application of the canons, and jurisprudential principles are never given definitive leave to govern the shape of the tradition as a whole. The tradition instead presents itself as first and foremost a huge, extended "project" of preserving and faithfully transmitting a series of traditional "primary" rules. Even the jurisprudential literature that does exist – and will increasingly exist – is always self-consciously subordinate to the traditional texts, mostly facilitative or exegetical in nature, and always built around the traditional texts as around a stable core structure. This handling of the texts strongly suggests a sense of the tradition as above all constituted by a body of traditional rules of a quasi-sacral nature.

In chapter two, the central point of the traditional introductory texts emerges as the desire to anchor the canonical texts in as many extra-legal narratives as possible. The prologues thus seek to cast the canons as part of broader scriptural and metaphysical narratives of salvation, and as intimately speaking to and intertwined with questions of morality, virtue and "life". Further, the canons are to be understood as a mode of teaching, as fundamentally paired with (but subordinate to) Scripture/faith, as easily glossable by some of the most commonplace philosophical and rhetorical definitions of law, and, as always, as grounded in tradition. The canons are also affirmed as indeed quasi-sacral texts.

The overall legal "message" of these prologues is thus hard to miss: Byzantine canon law is a legal tradition that intentionally, happily and probably necessarily *embeds* itself in a wide array of "extra-legal" value narratives. Although in chapter one the tradition emerges as existing as an autonomous physical textual reality, any other type of "autonomy" seems to be neither a value nor a goal.

In chapter three the canons themselves seem to enact or embody the tasks set for them in the prologues. These correspondences can be striking: the canons are cast as rooted in tradition, and the canons are indeed written as constantly speaking from and to earlier traditions; the canons are supposed to be about teaching and persuading towards virtue, higher morality, and a proper way of life, and the canons are frequently concerned with teaching and persuading towards precisely these themes; the canons are cast as quasi-scriptural and sacred, and the canons are, sure enough, littered with Scripture and frequently speak and act in surprisingly sacred registers. Like the prologues, then, the very textures of the canons seem to be oriented towards "linking" the rules into innumerable extra-legal narratives. The canons read as assuming that they are functioning alongside of and as part of broader systems of normative moral control.

In chapter three we also noted one small but highly significant terminological peculiarity: the lack of the phrase "canon law". This absence gives convenient expression to the physical shape of the tradition noted in chapter one. Instead of "naming itself" as an abstract project or field of endeavour, the tradition overwhelmingly thinks of itself in the plural and the concrete. Canon law *is* the canons. This is strongly emphasized by the tendency noted in the same chapter to stack a variety of genres and forms one after another in the corpus, with the original forms of the sources left more or less as-is. The traditional texts are apparently invulnerable to formal rationalization *via* homogenization or standardization: the concrete specificity of the traditions, as plural traditions, trumps any homogenizing tendencies of a systematic jurisprudence.

In chapter four, the deep conservatism of the tradition, and its attachment to the traditional texts, makes a final and dramatic appearance. The central point of the Byzantine "systematizations" seems to be the very simple task of assisting one in coming into contact with the appropriate laws – law "finding" in its most basic sense. Instead of representing complex processes of systematic interpretation or digestion of the tradition, the Byzantine systematic collections are deeply "transparent" to, and derivative from, the traditional texts, often to a surprisingly literal degree. Instances of interpretation and creative shaping of the material are not entirely absent – occasionally they are even significant – but overall their absence is more notable than their presence. Even the patterns of ordering imposed upon the material hardly represent dramatic re-shapings of the tradition, as most are already present in the canonical sources, and are in any case quite conventional. The patterns of ordering and "systematization" that do

emerge tend instead (at best) towards the symbolical. These thus function once again to embed the canons into broader narratives of (cosmic) hierarchal order – certainly they do not represent any profound rationalized arrangement by internal concepts.

One thread that runs throughout all of the chapters is the relationship of the canons to the civil law. Here a surprising consistency may be noted. On the one hand, the canons frequently cast themselves as comfortably part of the same general world of formal normativity as the civil law. They can share similar physical spaces, similar images, similar definitions, similar dispositive expressions, similar technical vocabulary, and similar forms of ordering and structure. At the same time, however, very rarely do the canons *directly* imitate the civil legal material: the two laws are usually, if not rigorously, distinguished in nomenclature; their genres and forms are not exactly equivalent; their selection of dispositives is slightly different; their precise systematic structures are generally proprietary; and they are distinct masses in the manuscripts – and the canons do sometimes explicitly distinguish themselves from the civil laws.

Both radical dissociation, and radical assimilation are thus avoided. The canons do not emerge as either a particularly "other" type of legal reality, nor do they emerge as a kind of parallel "ecclesial Roman law", a mirror of the civil system (as will develop more obviously in the west during the high middle ages). The relationship between the two is always one of "similar, but not quite the same". This relationship is, however, elusive of clear doctrinal articulation, and seems to be mostly negotiated through indirect, literary means.

From all of these observations, a basic legal architecture of Byzantine canon law can now be sketched.

As a whole, the "system" is above all centered around the preservation, transmission, and exegesis of one core corpus of quasi-sacral traditional texts. To an extent that is difficult for us to wrap our modern minds around, these traditional texts *are* the law. They are not exactly sources of canon law, nor expressions of canon law. Likewise canon law is not (or at least not primarily) an abstract project or doctrinal construct. Canon law is instead a concrete set of specific traditional texts gathered in a reasonably well-defined corpus structure.

This emphasis on law in the plural, as a gathering of concrete semi-sacral traditions, is accompanied by a surprising lack of interest in the development of a proprietary and sustained jurisprudential/doctrinal architecture – the secondary rules of

a legal system. This lack of a complex legal-doctrinal architecture points towards the theorization of Byzantine canon law as a "substantive justice system". In other words, the system is written for a conceptualization of law that is oriented above all towards finding the truly just and correct answer to every problem – and not simply a formally correct "legal" solution. In such a system, as A. Diamond has succinctly put it, "[t]he ruling internal principle (if it can be called such) is that justice should be done."[1] As a result, the system is not particularly concerned about its own operation as a coherent and predictable mechanism of legal concepts and techniques, safely isolated from "values" and any other unpleasant external variables that might disturb its equilibrium, i.e. its ability to produce a correct "legal" answer. Instead, the orientation of the system is precisely the opposite: it is deeply invested in constantly embedding itself into broader narratives according to which just decisions might be measured. The "message" of the system in this regard is thus simple: to get law right, you need to get Scripture right, doctrine right, morality right, your psychological disposition right, Greco-Roman concepts of justice, right, etc. – and in every case, every time. In a sense, then, the secondary rules of the system, the jurisprudential rules, principles and definitions, which seem to be so lacking, are furnished – and quite intentionally so – by a huge, if relatively stable, set of broader cultural images and narratives of "the just" (including, incidentally, but obviously not restricted to, Roman law).

This aspect of the system explains the lack of professional canon lawyers. The system is written not for a professional rule-expert proficient at operating proprietary legal techniques and definitions, but for a professional "culture expert", an educated amateur who is able to negotiate correctly among the mass of cultural narratives, along with the canons, relevant to any particular issue. Legal experts, if they still have a place in this world, are off to the side: assessors *advising* the judge/bishop.

Finally, the entire system is dominated by the notion of tradition.[2] Although not explicitly so, this is, I propose, the controlling concept of the entire system: tradition legislates, tradition adjudicates, and tradition interprets. Indeed, as we have already noted, tradition, in the form of the traditional texts themselves, is the law itself.

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[1] Diamond 1950,30.

[2] The idea of the centrality of "tradition" in first-millenium canon law is a major theme of Sohm's; see especially his idea of tradition, and not the church, as "infallible" (Sohm 1923,2.65-67). See also Glenn 2000 for his fascinating account of the role of tradition in "chthonic" ("primitive") legal systems, and Kuttner 1950,357 on the "dialectical rationalization" of the 12th C versus the "linear traditionalism" of the previous period (the former understood, of course, as an advance on the latter).

This aspect of the law is perhaps most obvious in legislation: as Sohm long ago noted, real law in this world always emerges from the past, and more recent material, however exalted its origin, always seems secondary. Changing and even adding to the law likewise seem somehow awkward: only time lends real confidence. Certainly categorical assertions in the present of authority *over* the tradition are quite difficult to find. In particular, the two most common form of leveraging authority against the tradition – a doctrine of sovereign positive legislative authority or the assertion of rationalized jurisprudential authority (i.e. through the application of rational juristic principles that can modify the tradition itself) – never seem particularly evident or prominent, unable on their own to modify the tradition or settle any matter. Additions, changes and interpretations by such authorities tend instead to emerge warily, fleetingly, and inconspicuously, mostly around the edges of the tradition, almost as if downplaying their own prominence. They await acceptance.

The embedded nature of the canons also conveys a traditional message: real normativity must always be linking itself into broader *traditions* of the just and right.

Curiously, however, this idea of "tradition" does not radically exclude contemporary addition, modification and even confrontation of the tradition. Throughout our period, the canons themselves make this clear, frequently modifying older canons, and likewise the prologues assume quite explicitly the slow, continuous growth of the system. Tradition is not, therefore, a doctrinal principle with systematically stifling consequences. It is instead more of a cultural-legal predilection towards systematically downplaying the importance and status of anything one is doing "now". It is more of a legal instinct than a legal principle.

Emphasis on laws-not-law, an orientation towards substantive justice, and the overwhelming dominance of the idea of "tradition" – these are thus the three pillars of Byzantine canon-legal theory that emerge from this study.

Two general observations may be made about the structure these pillars seem to support.

First, this system may be read as extraordinarily dissonant with the formalist legal world sketched in the introduction. It is possible to read Byzantine canon law as almost that system's opposite number, its eastern "shadow": whereas clear definition of the nature and domain of law as an autonomous type of social practice is critical to the one system, the emphasis in the other is on a "fuzzy" process of self-embedding in broader value narratives; the one prefers clear, logical, "clean" rules, the other "messy",

padded, rhetorical ones; the one places high value on precision, internal consistency, and gaplessness, the other is quite happy to tolerate high degrees of inconsistency, ambiguity and legislative lacunae; the one is very cautious about discretion and equity, the other seems to systematically prefer and assume it; the one is deeply invested in professional infrastructure, the other is not; the one tends to be highly malleable, instrumental and "secular", the other static, sacral and inviolable; the one is centered around deriving legality and justice from the logical application of rules, the other is centered around deriving legality and justice from a polyvalent engagement with tradition; the one assume a high degree of value-plurality, the other assumes – and instills – a high degree of value-uniformity; very broadly, the one is mechanical in operation and orientation, the other literary.

It is important, however, not to exaggerate these differences. Our own investigation of canonical language and style has shown that the Byzantines were at times quite capable of engaging in formalist-like legal discourse not so different from our own. Indeed, simply as a collection of formal written rules, Byzantine canon law does present itself as a "formalist" system in the most basic sense: it presumes that certain factual situations can be addressed by a series of more or less general rules. I quite suspect, in fact, that the vast majority of Byzantine canonical disputes were solved by reasonably straightforward application of rules in this matter. Further, one only needs quickly peruse the extant conciliar *acta* to become convinced of the ability of the Byzantine church to transact its affairs in quite technical, formalist-like ways.

Nevertheless the system as a whole is clearly not *written* for pure formalist legal operations. The structures and paraphernalia of legal formalism never obviously constitute what we most expect them to: the basic framework of the law's operation and conceptualization. Certainly formalism and its values do not emerge as the clear ideals of the system, nor do they suggest themselves as in any way the locus of the system's central instincts, habits or beliefs. In this sense, then, Byzantine canon law does represent a real inverse of modern legal expectations: modern systems are conceived more or less as fundamentally structured along formalist lines, and as containing some substantive-justice elements. Byzantine law (at least church law) is the opposite. It is fundamentally a substantive-justice system containing some formalist elements.

Finding a precise formula to describe the role and place of the technical-formalist elements in this system is, however, exceptionally difficult. I cannot claim to have found a definitive answer. Yet it is an important question to pose. Dieter Simon

recognized this problem when he noted that Eustathios does engage in very rational, even technically coherent arguments – but only *sometimes*. Particular arguments will often be very well-argued and internally coherent, but across the work as a whole there seems to be very little consistency: certain technical terms and arguments will be employed in one place, but not later in a very similar context.[3] Others scholars have noted similar phenomena where technical legal principles will be employed occasionally, but not always, and not necessarily as a definitive argument.[4] Modern-like formalist rule-reasoning is possible, but not regular and sustained. Similar dynamics have been noted throughout our study. Technical formalist-like discourse does emerge occasionally, but it is strangely desultory, and it certainly never appears as the controlling discourse of the system as a whole. It comes and goes.

The conclusion, however, that the Byzantines did understand and were capable of technical-legal discourse, and yet did not systematically employ it, is extremely upsetting from a modern formalist perspective. The point (supposedly) of this type of discourse is that it is meant to be employed regularly and consistently. In Byzantine hands, however, it often appears, ironically, as almost decorative, or perhaps opportunistic and supplementary. It is only one argument among others. Here Simon's suggestion that laws emerge as a variety of rhetorical *topos* is fascinating, and undoubtedly close to the truth. It would be interesting, however, to engage in a broader study to see if these formalist elements tend to emerge more in certain decisions, or topics, or with reference to certain classes of people, or certain types of cases (harder cases? easier cases?), than in others.

The second observation we must make about this legal world is that, from a certain perspective, it also seems strangely familiar and even expected. That it resembles many "primitive" systems, for example, can hardly be doubted; the description above is very much indebted to literature on such legal systems, as noted in the Introduction. Similarly, many of its dynamics seem very similar to those noted for early Greek law, also as noted in the Introduction.

But there is much here recognizable to any student of Byzantine culture. The image Byzantine canon law presents of itself is one of extraordinary stability and continuity: sacral, unchangeable (certainly change is ponderously slow), florilegic,

[3] Simon 1973,27-29.
[4] See the Introduction, nn. 43-44.

traditional, and hieratic. These are all stereotypes of Byzantine cultural expression.[5] Indeed, like much Byzantine art and literature, Byzantine canon law seems strangely numinous and "unrealistic", suffused with symbolism, dogmatic meanings and stock *figurae*. However, whereas in iconography or hagiography – and even historiography – we might easily accept such characteristics, in law they are jarring. Modern legal theory is accustomed to thinking of law in exceptionally mundane and practical terms, as part of a very human, perhaps amoral, nitty-gritty negotiation of competing interests. But the Byzantines seemed to have been trying very hard *not* to see it in this way. They tend instead to cast it as a very high-status, sacral matter, aesthetically significant and deeply rooted in, and constantly read against, the master narratives of Christian salvation and Greco-Roman philosophical advancement. In this respect, it is perhaps not unhelpful to consider that Byzantine law is to modern law what Byzantine hagiography is to modern biography or a Byzantine icon to a modern realistic painting or a Byzantine declamation to a modern political speech. They may share many important characteristics – sometimes perhaps very many – and yet their overall complexion is very different.

We may now return to the four disciplinary problematics raised in the introduction, and consider what my results might mean for each.

Despite my caricatured presentation of the two major streams of modern Orthodox canon-legal thinking in the introduction, my results in fact largely confirm the central instincts of much Orthodox legal thinking to date. The central instinct of the manual tradition – that Orthodoxy possesses a real law that deserves careful analysis and treatment as a real law – cannot, I think be doubted. One may endlessly argue about what precisely constitutes a "legal" system, but I believe it is safe to say now that the Byzantines themselves broadly did consider canon law as within the realm of "the legal". The Orthodox Church does have a law, and it is in fact a very high-status element of the tradition.

At the same time, however, canon law does not emerge as a mirror image of secular Byzantine law, as sometimes assumed by representatives of the manual tradition, and it is not safe to assume that whatever might apply to the secular Byzantine law could also apply to the canonical. (Much less, of course, can we assume that any of

[5] The cultural historian need only partially heed Lemerle's famous warning that "to represent Byzantium as immutable over a period of eleven centuries is to fall into a trap set by Byzantium itself." (*Cinq études sur le XI^e siècle byzantine*, Paris 1977 p. 251, cited in Magdalino 1999,115). If we are interested in understanding how the Byzantines themselves perceived their own society, and shaped its expression, this trap needs to be fallen into, at least occasionally.

the categories, ideals, presuppositions, principles or theories of *modern* law – also sometimes assumed by the manual tradition – can be directly and uncritically applied to the canonical tradition.)

As to the much more diverse "ecclesiological" streams of thinking, my results also largely confirm many of the recurring assertions of this tradition.[6] We cannot explore the correspondences here in depth, but they include the ideas that Orthodox church law cannot be separated from broader dogmatic narratives; modern formalist juristic categories do not fit the traditional texts well; change in the system does not happen as it does in modern legal systems; the laws are surprisingly sacral in orientation; the canons are very much concerned about morality, broader questions of life and virtue and are highly pedagogical in orientation; the texts are strangely allergic to formalism; and tradition is a central concept. In short, my results confirm the basic instinct that Orthodox canon law is a very different legal phenomenon from what we expect, and that it is not appropriately treated as simply another branch of continental civil law. The only substantial improvement I hope that my work represents is the provision of a more detailed and developed language for identifying and theorizing the legal dynamics present, and *as legal dynamics*. In this I hope to assist in the transformation of many of these ideas from rather vague philosophical and ecclesiological speculations to a more developed theory of Orthodox legal method and practice. I also wish to challenge the more radical assertions that Orthodoxy does not in fact possess a legal life.

With reference to both schools of thought, however, this work has above all sought to make a methodological point: it is extremely desirable, and indeed possible, to develop Orthodox legal theory through a close quasi-exegetical reading of the primary texts. In this process it is perfectly valid to bring modern legal categories and ecclesiological theories into the conversation with the texts – or modern theoretical and anthropological observations, as I have done. What should be avoided, however, is the tendency to formulate legal theory with hardly any direct or sustained consultation with the traditional texts at all, instead beginning, and mostly ending the conversation, with reference only to modern legal theory or modern ecclesiology. Like everything else in Orthodox theology, Orthodox legal theory must at least *begin* with the traditional texts themselves.

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[6] They are in fact very close to the presentations of those scholars who tend to straddle the divide between the manual and ecclesiological traditions: Erickson 1991, L'Huillier 1964, Meyendorff 1978a, Patsavos (Kapsanis) 1999, Pheidas 1998.

The contribution of this work to the second discipline, general historical theology/patristics, is perhaps more potential than realized. Nevertheless, the picture that has emerged in chapter one of a surprisingly unified, stable and universal canonical corpus will hopefully encourage further study of this material, *as a corpus*, as a significant and very prominent monument of the patristic legacy. As noted earlier, canonical texts tend to emerge in patristic studies as sources to be occasionally "mined" for specific pieces of data, and considered only in light of various local circumstances. Here, however, I have suggested that these texts may also be usefully studied as a prominent, coherent cultural whole that, precisely as a corpus of legal texts, encapsulates a rich set of beliefs and assumptions pertaining to ecclesiology, church order, and the definition and conceptualization of power in the church – and, of course, the nature of law itself. More specifically, my argument that the canonical tradition is overwhelmingly oriented towards substantive-justice solutions, and that it tends to present law as a numinous and quasi-sacred reality, may also serve as a caution against any precipitous assumptions about the formalist and positivist nature of early Christian canon law. The legal "texture" of patristic culture is in fact rather different from what we might expect: modern legal *mores* cannot be assumed as a historical constant.

The third set of problematics relevant to this study is those of the general history of canon law. Here I have sought to address two major narratives. The first is that of the supposed legalization/secularization of canon law after the 3rd century. This narrative is easily confronted, inasmuch as it tends to involve the retrojection into the 4th C of a full-blown modern legal formalism and positivism on the evidence of relatively minor patterns of formalization and regularization of terminology and perhaps canonical forms. As we have argued, however, the Byzantine tradition never sees real positivist-formalist legal-theoretical development – it doesn't even comes close. Even the assimilation of the canonical literature to contemporary secular legal literature will always remain ambiguous and occasional. Thus while a certain formalization and regularization of the tradition from, for example, the 2nd C to the 9th C, is undoubtedly to be observed, its true legal-theoretical significance is minimal. In effect, during this time, church law moves from being a loosely defined body of quasi-sacred charismatic traditional regulations deeply embedded in Christian metaphysical narratives to a slightly less loosely defined body of quasi-sacred charismatic traditional regulations deeply embedded in Christian metaphysical narratives.

The second narrative is that of the gradual evolution of canon law towards the 12th C western developments, when canon law finally emerge as an autonomous legal discipline parallel to the secular legal system, complete with jurists, faculties, professional lawyers, and a strong positivist legislator – and a completely reconfigured textual tradition (Gratian's *Decretum*). In the western tradition of canonical historiography, this development is usually considered natural, a movement from the primitive and chaotic to the ordered and advanced. The Byzantine experience, however, as sketched above, offers a very different perspective on these developments. No aspect of this transformation appears particularly likely, natural, or even desirable: one is never supposed permanently to select or sort among "the canons" (as Gratian does); the system is never autonomous and "dis-embedded" from theology, nor (thus) professionalized, and it is not supposed to be; clear assertions of (present) positive legislative authority tend to be avoided; dramatic imitation or internalization of the secular patterns is very rare; and jurisprudence is generally highly exegetical in character, not constructive (or destructive) of the tradition.

More broadly, the eastern experience also challenges the ubiquitous reading of these western developments as the introduction of uniformity and stability, and the end of canonical "localism". Although this reading is undoubtedly valid within the Latin experience, from a broader, more global canonical perspective the western 12th C developments may be read as precisely the moment of the definitive shattering of an older pan-Christian "imperial" canonical tradition. In the 9th C the *Dionysius-Hadriana*, the *Coll14* and the Syrian *Synodika* contained much very different material, but their core Nicene corpus was the same (and identifiably a core), and they are clearly the same *type* of collection: they witness to the same idea of a highly traditional, accumulative canonical source collection built around the old Nicene corpus. At least on a textual level, they represent a common canonical world. By the end of the 13th C, the Byzantine collections, and many of the oriental collections, will look much the same; but the western textual world is completely changed, and hardly recognizable. An older common Christian canonical world – with its center of gravity surprisingly in the east – is gone.

If we replace a western set of prejudices with an eastern set, then, it is entirely possible to view the western 12th C development not as an evolutionary movement from the primitive to the advanced, but as the endpoint of a strange unraveling of a well-established imperial tradition of church law – and, perhaps, with Sohm, as a very real

devolution into legal formalism. Certainly it is perfectly possible to look at the Byzantine experience as a "normal" progression, perfectly consistent on its own terms (increasingly fossilized, overwhelmingly exegetical), and continuous with the older imperial tradition, while the western one (massive reconfiguration, jurisprudential creativity, increased formalism, secular-like re-formation) seems the odd-system-out.

Less polemically, however, the Byzantine experience simply throws into higher relief the problem of explaining the extraordinarily different development of the western and eastern systems. Both traditions start with very similar traditions, and similar legal resources and backgrounds – but both end in very different places. Why? Whatever the answer may be, recourse to "natural evolution" on the western side is not sufficient.

The final set of problematics in the background of this study is those of late antique and Byzantine law, and particular the issue of the eternal defectivity of late Roman and Byzantine legal phenomena. Here my work has very much followed in the footsteps of the Byzantinists who have sought to read the many odd and "defective" characteristics of Byzantine law not as evidence for decline or corruption but as an opportunity for re-thinking the cultural-legal paradigm that has produced these narratives of decline and defectivity in the first place. My work has, I think, largely confirmed this approach inasmuch as I have shown that Byzantine canon law does not read convincingly as one long, failed attempt to try to form itself into a formalist-positivist legal system. Quite the opposite, it reads as a surprisingly coherent and internally consistent legal world that is simply operating according to a very different set of priorities and ideals than those expected by much modern legal historiography. If taken "on its own terms", the Byzantine legal world does not need to be explained by narratives of decline, primitivism, or corruption. One does not even need to explain the phenomena with reference to socio-political change (although one could). Byzantine canon law can be read as a theoretically coherent and "satisfying" legal structure quite by itself.

My results may be one more indication that even in late antiquity we should be cautious about taking for granted the traditional formalist-positivist vision of law of many of the older generations of Romanists. Although late antique law is very complex, my suspicion is that already in this period many of the dynamics noted for Byzantine canon law are more operative as legal-cultural ideals than is commonly acknowledged, including the tendency to think of law as a set of sacred traditions, a disinclination to value or honour narrow and technical rule-logic and rule-manipulation,

an emphasis on substantive solutions, and a preference for "amateur" dispute resolution. Indeed, if this is true, it may ultimately even be possible to "turn the tables" on much modern legal historiography of this period, and, read (in part with Biondi) the theoretical developments of late antique and later Byzantine law not as a decline but – from the perspective of its contemporaries, at least – as an *advance*, a kind of "correcting" of the somewhat odd and peculiarly formalist orientations of the old Roman law. Certainly from the perspective of a system like Byzantine canon law it is precisely the more formalist and technical-conceptualist elements of classical Roman law that suggest a certain deviance – and even, perhaps, a certain vulgarity? In any case, further cultural-historical investigation of the late antique legal imagination would be welcome.

The Nature of Law and Legality in the Byzantine Canonical Collections 381-883

Volume Two of Two

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2010

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VOLUME II

APPENDIX A
Appendix to Chapter 1

(The following are supplementary notes, supplying further details, texts and examples for various points in the main text. These notes are referred to in the main text and/or footnotes by appendix and note number.)

1) [from p. 28, n. 11] The central corpus of *RP*, volumes 1-4, although drawing heavily on a 17th C humanist edition (Beveridge 1672) took as its model a very complete 14th C MS, Istanbul Topkapı 115 (via Athens EB 1372, an 18th C copy; see Menebisoglou 1982,193-206). *RP* nevertheless omits the scholia, places certain texts in footnotes, and following Beveridge includes all three commentators in the corpus section, a combination never found in any manuscript. The appendix material in volume 5 – even excluding, obviously, the modern Greek material – does not seem to reproduce any particularly example of the Byzantine canonical appendix tradition *per se*. (On George Rhalles and Michael Potles, and the historical circumstances of their edition, see further Deledemos 2002,3-10.)

2) [from p. 28, n. 13] For example, early Greek positive lawgiving, and even the concept of law, may be connected with the emergence of writing (Kelly 1992,9; Gagarin 2005,91-92, now Gagarin 2008; cf. Thomas 2005,50). The 3rd-5th C shift from roll to codex has also been connected with patterns of canonization, selection and compilation in late antique law (Wieacker 1960,93-119), and it is not difficult to suppose a connection between the rise of the codex and the emergence of both the great Roman and Jewish legal codifications of the 5th and 6th C (see broadly Heszer 1998). The more schematic and systematic presentations of canon law known from the 16th C, rather different from the older corpus-centered exegetical teaching method (see Gaudement 1991; Naz 1949,1480-1483; Schulte 1875,3.3.279-281; Plöchl 1959,3.352-353), are also notably post-printing developments, as are almost all modern rationalized, constructivist and systematic presentations of the law (e.g. the Insitutionalist systems, the natural law systems, the Enlightenment codification projects). See generally Ong 1982.

3) [from p. 30, n. 18] A full and thorough survey of the form and content of the Byzantine canonical tradition as found in the manuscripts is neither available nor – outside of the work being undertaken at the Max-Planck-Institut für europäische Rechtsgeschichte (MPIfeR) in Frankfurt – even possible given the state of the

manuscript catalogues and indices. Nevertheless, a general overview, adequate to the needs of this work, is possible utilizing all of the resources now available.

From an examination of the principal editions and text-critical works (*Fonti*, *Pitra*, *Sin*, *Syn*, *Sbornik* and *Kormchaya*), the catalogue indices,[1] and pre-17th C canonical material indexed (loosely and often inadequately) in the Greek Index Project Series (now continued by *l'Institut de recherche et d'histoire des textes* online as the project *Pinakes*: *Textes et manuscrits grecs*, http://pinakes.irht.cnrs.fr), it is possible to amass a list of approximately 500 reasonably complete Byzantine canonical manuscripts. This figure that does not include mostly penitential, liturgical or monastic regulative works (e.g. Typika). This total tallies approximately with a provisional working list (as of April 2009) of the manuscript holdings of the MPIfeR, pared down with the same restrictions, for which I am deeply indebted to the MPIfeR for sharing with me.[2]

Of these approximately 500 canonical manuscripts, a quick survey of their contents through *Pinakes* and the catalogues reveals that about a quarter (~130) are irrelevant for discerning the shape of the tradition during our period. The majority of these contain the collections of Blastares (14th C) and Malaxos (16th C), as well as Nikon of the Black Mountain's quasi-canonical *Pandects* and *Taktikon*, the juridical works of Chomatianos and Apokaukos, the 14th C patriarchal registers, and a few other fragmentary or late miscellaneous manuscripts. These works do not directly witness to any earlier structures *per se* (although some of the versions of Blastares contain appended 883 corpus structures, in very normal and unremarkable forms, for example. Paris gr. 1337).

Approximately half (~240) of these manuscripts contain earlier collections in their 12th C commentary recensions. These include most commonly Zonaras and Balsamon writing (more or less) on the 9th C "Photian" (883) canonical corpus, but also Aristenos, writing on a more restricted selection of material, and attaching his commentary to an epitomized version of the corpus (Aristenos, however, is a small work often tacked-on to larger structures). Because these commentaries are written on

[1] In addition to individual library catalogues (as per Richard and Olivier 1995, now also updated on *Pinakes*), the first volume of the *Repertorium der Handschriften des byzantinischen Rechts* (Burgmann et al. 1995), the first product of the MPIfeR manuscript description project, provides up-to-date and accurate descriptions of over 300 secular legal manuscripts, many of which also contain canonical content.
[2] Burgmann et al. 1995,x, however, provisionally placed the number of canonical manuscripts at approximately 600. It seems that this discrepancy arises because this latter number includes a larger number of manuscripts which contain either relatively fragmentary extracts of canonical manuscripts, or are of monastic or liturgical regulatory content, or are fairly late.

pre-10th C collections, which they preserve more or less in their integrity, these manuscripts are important for discerning the earlier shape of the tradition. At the same time, however, because they are exceptionally uniform, at least as far as the underlying corpus is concerned, our survey of them has been comparatively cursory. The follow manuscripts have been examined in microform: **Athens** EB 1372 (18th C copy of Istanbul Top. 115); EB 1429; Venak. 20; **Florence** Laurent. 5.2; **Istanbul** Topkapı 115 [= Codex Trapezuntius, underlying Rhalles-Potles]; **Vatican** gr. 844; **Vienna** iur. gr. 10 (Aristenos). In addition, virtually all of the descriptions of the pre-16th C manuscripts (and many later) found in the following excellent and usually very detailed catalogues have been quickly consulted: Florence (Laurent.); Milan (Ambros.), Moscow (Synod., now GIM), Naples (Bib. Naz.); Paris (Bib. Nat.: Coislin, gr., supp gr.); Rome (Vallic.); Vatican (Bib. Ap. Vat., Barb., Palat.); Venice (Marcian); Vienna. Further, I have quickly examined all of the relevant *Pinakes* entries for Zonaras, Balsamon and Aristenos.

In basic structure, the commentary-manuscripts of Zonaras and Balsamon are very predictable. Manuscripts typically begin with an introductory section containing one or more prologues, and perhaps some other introductory-type articles; then the systematic index and other various *accoutrement* of the *Coll14* is sometimes provided; then the Photian corpus follows in the "systematic" or Tarasian form (see chapter 1.C.5) with one or perhaps both commentaries of Zonaras and Balsamon attached lemmatically, i.e. following each canon, in the main text of the manuscript. Later parts of the manuscripts are taken up with much more variable sets of articles, i.e. "appendix" sections.

The underlying collection in these manuscripts, in both structure and content, generally appears to be a completely normal *Coll14* 883 corpus, more or less as found in *RP* or *Pitra*, and more or less as found in non-commentary recensions, despite small variations in layout. In effect, the commentaries are simply built around or "hung off of" the older structure of the 883 corpus. Patterns of extraction, addition, re-ordering, omissions and interpolations, as least as relate to this corpus structure itself, seem to be very few: the text of the canons seems fossilized and regular (although it is possible that future work will reveal more variation).

The collections of Aristenos suggest a similar structure, but in miniature: a brief prologue is followed by a slightly smaller corpus of material, usually in a pre-Tarasian order (see chapter 1.C.5), with Aristenos' commentary following each canon.

The remaining ~130 manuscripts have been the focus of this overview. These contain more or less "pure" pre-commentary recensions of the canonical texts, and have been the traditional focus for historians and editors of the first millennium Byzantine texts. These manuscripts typically contain straight corpora of canons or the *Coll50* or *Coll14* in various recensions. All these texts have their origin in our period, but no manuscript contains works completely untouched by later post-9th C expansion – i.e. all pre-9th C collections must be reconstructed. Nevertheless, the work of Beneshevich and others has shown that the basic shape of earlier forms of these collections are recoverable: expansions are usually quite easily identifiable as such, tacked-on to or placed around older structures.

Of these manuscripts, the following have been examined in microform: **Athos** Meg. Lav. B.93; Koult. 42; Pant. 234; Vatop. 555; **Dublin** Trin. 199; **Florence** Laur. gr. 10.10; **Jerusalem** Pan. Taph. 24; **Milan** Ambros. M.68 supp; **Moscow** Syn. 398; **Naples** II.C.7 (=gr 75); **Oxford** Barroc 26, 86; Laud. 39; **Paris** Coislin 36, 209, 211; gr. 1319, 1320, 1331, 1370, 1371; gr. supp 614, 1085, 1086; **Patmos** 205; **Rome** Vallic. F.10; Vallic. F. 47; **Sinai** 1112,1113; **Turin** Bib. Naz. B.II.26; **Vatican** Barb. 578; gr. 640, 843, 1980, 1981; **Venice**. Marc. app. gr. I.29 [= Nanian 22]; **Vienna** hist. gr. 7; iur. gr. 5.

Of the remaining manuscripts, reasonable (sometimes excellent) descriptions exist and were consulted for the following: **Andros** Pant. 6-7; **Athens** Eth. Bib. 1370; **Athos** Iver. 302; Meg. Lav. B.93; Pant. 141, 234; Phil. 42; **Camb**. Univ. Ee. iv. 29; **Escorial** X.III.2; **Florence** Laurent. gr 5.22; 9.8 ; **Istanbul** Panagias (Chalk.) 175; **Jerusalem** Cruc. 2; Metoch. 635; **London** BL Add. 28822, 34060; **Milan** Amb. E. 94 sup; B. 107 sup; D. 317 inf.; F. 48 sup; G. 57 sup. **Moscow** Arch. 3; Syn 397, 432, 467; **Munich** Bay. Staat. Bib.gr. 122, 397; **Naples**: Bib. Naz. II.C.4; II.C.7; **Oxford**. Baroc. 185, 194, 196; Gr. misc. 4, 206; Rawl. G 158; Rawl. Misc 170; Seld B.55; **Paris** Coislin 34, 35, 364, 1263; gr. 1324, 1325, 1326, 1334, 1369; Paris supp. gr. 483; **Patmos** 172-173; **Rome** Vallic. F 47; **St. Petersburg** GPB 66; **Vatican** gr. 640, 827, 829, 840, 1142, 2060, 2184, 2198; Palat. 376; **Venice** Marc. 169, 170, 171; app.III.2, III.17; **Vienna** iur. gr. 9; 11; hist gr. 56, 70.

In total, 108 manuscripts or manuscript descriptions were examined. These include virtually all of the manuscripts consulted by Beneshevich and Joannou, and many of those listed (if not used!) by Pitra. Further, they include all of the manuscripts

that may pre-date the second millennium:[3] Athens 1370 (10th C); Jerusalem Hier. Cruc 2 (a. 928-931); Jerusalem Pan. Taph 24 (10th-11thC); Moscow Syn. 398 (9th-10th C); Paris Coislin 209 (9th-10th C); Paris gr. 1334 (10th C); Paris gr supp. 614 (10th C); Paris gr. supp. 1085 (10th C); Patmos 172-173 (9th C, perhaps first half); Rome Vallic. F 10 (10th C); St. Petersburg GPB 66 (10th C); Turin Bib. Naz. B.II.26 (10th C); Vatican gr. 843 (9th – 10th C); Vatican gr. 1980 (10th-11th C); Vatican gr. 1981 (10th-11th C); Vatican Palat. 376 (10th C); Sinai 1112 (10th-11th C); Sinai 1112 (10th-11th C); Venice. app. gr. I.29 (10th C). They also include representatives from all of Beneshevich's *Coll14* and *Coll50* recensions, as well as of the three known 11th C recensions (see Schminck 1998). Further, they include numerous instances of the synopsis, in various forms.

The *Pinakes* project does not at present adequately index many of these canonical manuscripts. Nevertheless, as a supplemental exercise, the relevant entries under IOHANNES SCHOLASTICVS CPL PTR III and PHOTIVS were investigated, as were the very varied entries under IVS CANONICVM,.

The results of the overview of these manuscripts form the basis of the observations in chapter 1, and are discussed, in particular, in section C.1.

4) [from p. 38, n. 58]Athanasius (particularly his letter to Rufinianus), Gregory Nazianzen, and Amphilochius are not always listed in the traditional tables of contents of the *Coll14*, nor in the thematic index references. Gregory Nazianzen and Amphilochius, in particular, seem to have had particularly variable fates in the manuscripts, sometimes missing even in the corpus sections; see *Fonti* 2.xix-xx; also *Delineatio* 69, 129, 131; *Sbornik* 89-91;142-148; *Sources* Fathers. It is therefore suspected that all are later additions. Gregory Nazianzen and Amphilochius, in fact, are not securely attested in any canonical witness until Trullo canon 2 – although a manuscript that may contain a pre-Trullan recension, Patmos 172, does contain them (*Sbornik* 236). In the later expanded *Coll50* recensions described by Beneshevich, Gregory Nazianzen and Amphilochius are also often missing (e.g. "Group A", "Group B", Paris Cois. 211). Stolte 1998a,190 notes the possibility of an even smaller selection of fathers in the original *Coll14*. Unquestionably the fathers always constitute one of the "softest" spots in the corpus.

[3] Dating of these manuscripts can vary considerably among catalogues, editions and surveys; I have tended to privilege Beneshevich.

5) [from p. 41, n. 82] The early Byzantine and Slavic usage of νομοκάνων for collections with civil and canonical material is so consistently inconsistent that we must wonder if the term did not originally mean "canons-and-laws", but only had this meaning attached to it later, perhaps with a degree of artistic license (the first certain reference is, of course, in a poem). While it is true that copulative compounds of the type "canons-and-laws" are fairly common in later Greek, if rare in the classical and Koine (Browning 1983,71, 87-89; cf. Smyth 1956,253), it is still just within the realm of possibility that the word originally meant something closer to "canon *of/for* the law" – a phrase that could refer to any type of regulative handbook (perhaps originally close to the sense of a table of penances?), just as apparently observed in the real Byzantine use of the term. Pavlov (1874,39-42) briefly considered this suggestion in light of the fact that the Georgian translation of "Nomocanon" does in fact read "canon of/for the law" – as does, as Pavlov notes (p. 40), somewhat in passing, the Slavonic законуправило (and not законоправило), one of the oldest translations for νομοκανών (on this translation, Černyševa 1998,522-523; on Slavonic compounds, Vaillant 1963,1.215). Pavlov came to little firm conclusion about this possibility, but Beneshevich seemed to consider it an open question (*Sbornik* 105 n. 4).

6) [from p. 49, n. 133] Athos Vatop. 555 (12th C), for example, is a highly unusual collection of extracts in 89 sections, many containing disjointed series of canons, apparently gathered around particular topics (although the beginning of the manuscript is lost – perhaps this is just an unusual appendix section?); Paris Cois. 364 (a. 1294) mixes many extracts from the synopsis with the full texts of the canons, breaking the normal rule of completeness; Vienna hist. gr. 70 (14th C) seems to contain most of the normal components of a full canonical manuscript, but in a very confused order; the recently described Oxford Bod. gr. misc. f.4 seems to be a bizarre unraveling of the *Coll50*, with the canons extracted in sections. See Paris supp. gr. 1089 (16th C) for an example of a highly extractive handbook-type collection of miscellaneous canons that seems to become more regular after the 15th C.

7) [from p. 50, n. 138; also from p. 53, n. 146 and p. 217, n. 47] The *Coll50* is extremely scrupulous about not omitting even one canon of its source corpus. One could almost place each canon of its corpus on a card, rearrange those cards, and arrive at the *Coll50*. Even divisions of canons are very limited (see Appendix B (7)).

Until a definitive edition of *Coll14* is produced, it will be impossible to identify with complete confidence those canons that are regularly missing in this collection's systematic references, in any recension. In *Kormchaya*, witness to the oldest recension at present published, the following canons are not present in the systematic references (they are present in this recension's corpus): Antioch 12, Laodicea 38, Gangra 10, Theophilus 3, Basil 15, 16, and Carthage 34, 51, 52, 64, 67, 69, 74, 75, 77, 78, 82, 85, 87, 88, 91-94, 97, 99-101, 105, 107-119, 127, and 134-138 (although these last 5 are not always numbered in the corpus, and probably should not be included; note also that this list of omissions is very similar to those made by Cresconius in his *Concordia*; see Zechiel-Eckes 1991,1.7). Upon inspection of the variants in *Kormchaya*, *RP* and *Pitra*, Antioch 12, Laodicea 38, and Gangra 10 – canons which are unremarkable, and which do not suggest any particular reason for their omission – can all be accounted for, and we may tentatively presume that they have simply slipped out by mistake in the particular manuscripts privileged by Beneshevich. As such, it is probably safe to assume that the *Coll14* did originally tend to contain all conciliar canons, save those missing from Carthage. Theophilus 3 is more troublesome: it does not seem to occur in any variants in any of the modern editions. Its content, however, seems unremarkable: it simply confirms a deposition and notes that deposed presbyter may appeal his deposition to the synod. It could easily have been placed under chapter 9.5 or 9.6 – or 9.14. Its absence is perhaps a simple oversight.

The chief omissions, therefore, seem to be only in the newest material added, i.e. from material not present in the *Coll50* corpus: the first letter of Basil, Carthage, and perhaps Theophilus. (Most of these canons seem to be omitted because of their exclusively doctrinal or very local content.) In Jerusalem Pan. Taph. 24 and the Michael/Theodore recensions, however, they are all more or less added back into the collection in a separate chapter of title 14. See the descriptions in Burgmann et al. 1995,47, 106.

8) [from p. 50, n. 139] Gratian's *Decretum* is the ultimate example, but all of the Gregorian collections are of this type (Fournier 1931,1.77: "les réformateurs subordonnent à leur programme le choix et l'ordre des canons"; descriptions in Fourner 1931,2.3-54). On the creative potentialities and realities of the later western systematic collections, see especially Mordek 1975,6-7, Pinedo 1963,291-292. When precisely western systematic collections shift from at least notionally *transmitting* an older corpus

to actively building new corpora – i.e. starting to construct "canon law" as a more abstract set of valid norms, and thus choosing and selecting among the traditional texts – is difficult to pinpoint. Western canon law historians do not tend to view this transformation as in need of explanation: it is simply part of the natural evolution of the tradition towards Gratian, and a normal function of the gradual increase in the papal exercise of its legislative authority. In light of the Byzantine experience, however, it is the single most peculiar aspect of western canon law: how does Gratian's *Decretum*, which looks like a selective "school-book" commentary *on* the corpus, in fact *become* the corpus?

9) [from p. 51, n. 140] The traditional typology of collections as "chronological" and "systematic" should probably be abandoned. The first term has already fallen under criticism in western canon law, and has increasingly been replaced with the better "non-systematic" (so Fransen 1973; see also Mordek 1975,3). Both terms, however, are particularly problematic in the east. First, no extant collection in the Greek east is *ever* "chronologically" arranged; every exemplum, by virtue of the Nicene prefacing, is explicitly and consciously not chronological; that's the point. Every collection is thus "systematic" in the (relatively rare and confusing) usage of the term to describe a corpus collection that has undergone hierarchical source reorganization of some type (so, for example, Beneshevich speaks of the "systematic" Tarasian recension in *Sbornik* 260-288, and so *Sources* Introductions; also Nelson 2008,305 speaks of the Dionysian collection of conciliar and papal materials as "systematic") . By the same token, as we have just noted, most eastern sources that are "systematic" in the more conventional usage of the term (i.e. employ a topical index and/or organization) are also "chronological" collections in that they still presume and transmit a full chronological collection. In effect, then, they are simply indices *to* the chronological corpus. A much better general typology, therefore, which Maassen partially employs, would be 1) "general" or complete corpus collections, which, whether with systematic paraphernalia or not, notionally convey a complete corpus structure (at a given time) faithfully, with little or no selection, interpolation or modification within each source; and 2) partial or handbook collections, which either give only an abbreviated or selected taste of the whole corpus, or are addressed to a specific question.

10) [from p. 51, n. 141] It is well recognized, of course, that the Antiochian corpus is a central source of the entire Christian tradition. Schwartz and Maassen are well aware of this, and Cardinal Gasparri is often cited as noting the Antiochian corpus as *antiquarum collectionum fere omnium quasi principium et fons* (from his preface to the 1917 *Codex Iuris Canonici*; see for example Stickler 1950,3; Gaudemet 1985,76, also 41, 165). Similar is Fournier's concept of "ancien droit" (1931,1.3-126, esp. 12-21), and Ferme's "common substrate" of early law (1998,58). For Selb this fact is self-evident: 1989,103-104. See also now Bucci 1992,94-98. Nevertheless, the atomistic presentation of early canonical collections, especially after the 5th C, as a kaleidoscopic array of regional variation with little reference to their morphological and substantive similarity, and each with their own special modern name, tends to render the unity of canonical culture in the first millennium only vaguely perceptible in most modern surveys (e.g. Gaudemet 1985; Reynolds 1986). It is certainly not sufficiently emphasized. This tendency is magnified by canon law historians of the high middle ages whose master narrative of the early middle ages seems to be always about "dissonance" moving to the "harmony"; certainly there is little sense that the earlier period possessed any kind of standard text structures. See, for example, Brundage 1995,22-23, 43; 2008,97; Gallagher 2002,121-122; Kuttner 1960.

11) [from p. 58, n. 172] The best example is Athos Pant. 234 (12th-13th C) which, without being a later synthesis of two manuscripts, is half biblical/theological manuscript, and half *NC14* (Theodore recension). Similarly Oxford Baroc. 194 (15th C) is essentially a grammatical manuscript with Zonaras appended. BL Add Mss 34060 (15th C) is a more marginal case: a fairly normal corpus structure may be found in the midst of "appendix" items that simply far exceed the normal degree of heterogeneity and quantity (including very miscellaneous historical, liturgical, and theological articles). Note that these last two examples are rather late.

Much more common are manuscripts of a variety of contents that, perhaps devoted to a specific task or theme (e.g. anti-heresy or anti-Latin treatises, or a set of sermons), happen to have small sections citing topical canons. See for example Vatican gr. 572, 720.

12) [from p. 60, n. 177] First, the rubrics of the thematic collections, read as wholes, do read as an abstracted summary of the canons. However, the thematic collections

themselves are always explicitly written as thematic guides to the sources, not as developments beyond the sources, and the thematic rubrics are always accompanied by references to specific canons. One never simply lists a series of anonymous rules following a particular heading: one lists all of the relevant canons *by source*. Further, to anticipate the results of chapter four, the thematic rubrics themselves are exceedingly conservative and derivative restatements of the traditional canonical rules: they do not for the most part represent creative rationalized interpretation of the traditional rules. They do not thus "advance" the law beyond the traditional rules. The instinct and "movement" of the thematic collections is always towards facilitating use *of* the traditional sources.

The other main exception is the pre-6th C incarnations of the corpus as continuously numbered wholes. Here the rules do seem to be presented as much more anonymous and abstracted, referable as "canon 166" or "canon 87". However, even in these collections, the canons were still arranged by legislative source: Nicaea, Ancyra, Neocaesarea, etc. The canons were not re-arranged or mixed in any way. More importantly, in the two principal extant witnesses to this enumeration, Dionysius II and the Syrian London BL syr. 14528, the conciliar sources are still separated by headings, even introductions, and in BL 14528 *both* continuous and source numbering systems are present.[4] Therefore the continuous enumeration runs through the different councils, but the individual identity of the councils is still very much present. Certainly there was no difficulty in the 6th century in breaking the continuous collection back into its constitutive source parts.

13) [from p. 61, n. 181] The idea of a "cleaning" (ἀνακάθαρσις) of the law, including processes of clarification, paraphrasing, and even pruning of obsolete material, does emerge in Byzantine secular law, although even here it perhaps implies mostly a movement of repristinization and renewal of older forms, not radical change (see *Delineatio* 81-87; Fögen 1987,152-153; Pieler 1989). It is possible that a similar process was at times envisaged for the canons. The best prospect is perhaps the Edict of Alexios I, a.1107 (text and commentary Gautier 1973; see Magdalino 1996 and now also Schminck 1998,367, where it is dated to 1092). This text seems to suggest some type of legislative review of the nomocanon (Gautier 1973,197), although it is far from clear that this texts is discussing anything more than renewing canons that have fallen

[4] *Delineatio* 26; Lietzmann 1921,492; Schwartz 1933,3.

into disuse, or perhaps fallen out of the nomocanon (Gautier 1973,171, Schmink 1998,368, esp. nn. 57, 58; also Macrides 1991,590). If the intent truly was to purge the older canonical material, it clearly failed. As it turned out, the real Byzantine response to dealing with problems in the corpus was the commentaries – i.e. to add a new interpretative layer – and not the restructuring of the tradition itself (for the idea that this Edict may have stimulated the commentaries, Macrides 1991,590).

14) [from p. 68, n. 207] Nikodim Milaš thus considered that a very normal and unremarkable assertion of canonical fidelity in the concluding lines of the Tomos of Union 920 (*RP* 5.4-10; the passage at 10) effected an official recognition of the 883 corpus (Milaš 1902,254). The text (τοῖς ἐν καταφρονήσει τιθεμένοις τοὺς ἱεροὺς καὶ θείους κανόνας τῶν μακαρίων Πατέρων ἡμῶν...ἀνάθεμα) in fact suggests no such official confirmation. Unfortunately, Milaš's "920" date was adopted by Charles de Clercq in his influential *DDC* article on Byzantine canon law (de Clercq 1937), as well as by Gaudemet in his *RE* article (Gaudemet 1965), with the result that it has been regularly asserted ever since (for example, *Fonti* 1.xvii; Morolli 2000,314; Nichols 1992,417; Rhodopoulos 2005,84; innumerable encyclopedia articles). S.V Troitsky seems to have first caught the error in the 1950s. See Žužek 1964,25 n. 34, and now *Historike* 91-92.

15) [from p. 70, n. 213] This reading goes back to the first Greek-language canonical manual, Δοκίμιον ἐκκλησιαστικοῦ δικαίου of Apostolos Christodoulos (Constantinople 1896; cited at length in Christopoulos 1976,255-266), and is based upon a comparison of the concluding dispositive statements of Trullo 1 and Trullo 2. The former, it is argued, is highly categorical, and affirms the absolutely unchangeable nature of dogmatic teaching. The latter, it is claimed, is phrased in less categorical terms, and is aimed only at the illicit falsification of the canons. The conclusion is therefore drawn the modification of the canonical tradition by a legitimate ecclesial authority – i.e. an ecumenical council, such as Trullo itself – is tacitly approved, while any change to doctrine completely forbidden. Trullo itself does, it is noted, add new canons, and modifies older traditions.

Although attempting to read clear legal-doctrinal distinctions into the highly ornate and rhetorical language of Byzantine legislation is inherently questionable (and, in any case, one of the key phrases in Trullo 1 on the unchangeability of dogmas, οὔτε

προστιθέναι τι οὔτε μήν ὑφαιρεῖν, from Deut 12.32, is applied to the canons in II Nicaea 1), this reading is perfectly correct, and even helpful, inasmuch as Trullo is certainly establishing a hierarchy between doctrinal and canonical regulations, and there is no sense in Trullo 2 that the council is forbidding further canonical legislation *per se* – obviously the council itself engages in it, and so does II Nicaea. Falsifications are indeed its principal target. The problem is that this reading is usually made in the context of attempts to support modern plans to codify the Orthodox canons, which anachronistically read into Trullo the authorization of modern-like positivist authority, i.e. authority *over* the tradition so extraordinary as to be able to radically change the canonical tradition through omission, abrogation, and radical reorganization of the tradition. But nothing could be further from the council's intention, content, or tone – or the whole tradition's development. The council simply witnesses to what is always the Byzantine legislative "formula": confirm the older tradition in order to *add* – and only add – to it. Radical renovation of the established textual tradition is unheard of. The council thus tacitly approves only a tentative and chary "traditional positivism", which allows for additions, and perhaps "neatening" of the tradition – but nothing further.

16) [from p. 71, n. 218] It is now recognized, for example, that "private" collections, by embodying authoritative traditions, could continue to exercise considerable authority for their users whatever the official stance of the government towards them. The best examples are probably the so-called "rustic laws" (Pieler 1978,432-433), but also the *Eisagoge* (Pieler 1978, 457). Similarly, "official" actions did not necessarily have much effect on the reception of a collection. The (iconoclast) *Ecloga*, for example, would continue to be copied despite the probable intention of the *Prochiron* to "officially" replace it (Pieler 1978,452; or, alternatively, to replace the *Eisagoge*, so Schminck 1986,64-65). In general, it seems, anything old and traditional, and slightly numinous, tended toward the authoritative, whatever anyone said, or whatever reason could be proffered to the contrary – and whether "private" or "official". "Official" recognition no doubt existed in this world, but it was not apparently particularly important or even necessary. On this point cf. also Firey 2008, where it is argued that the development of canonical collections should be understood more in terms of imperial/papal reception than "official" promulgation or recognition.

APPENDIX B
Appendix to Chapter 2

(The following are supplementary notes, supplying further details, texts and examples for various points in the main text. These notes are referred to in the main text and/or footnotes by appendix and note number.)

1) [from p. 84, n. 8] Most fully preserved novels from the 5th C onwards have prooimia structures. I have examined all those attached to the 6th C ecclesiastical laws, and a selection of those attached to other laws. For all of these, and more, Hunger 1964 remains a critical resource. Other helpful, often more narrowly focused, examinations include Biondi 1952, Honig 1960, Lanata 1984. The prooimia of the novels of Leo, which are estimated to comprise two-thirds of the Novels' full text (Fögen 1995,1602; texts in Noailles and Dain 1944), have also been consulted.

In addition, the following materials have been examined.

A) Materials introducing late antique collections:

- Connected with the Theodosian codification (texts in *CTh*):
  - *CTh* 1.1.5, 1.1.6
  - Novels 1 and 2 of the Theodosian novels
  - the full *Gesta* of the senate's reception of the *CTh*
- Connected with the *CJC* (texts in *CJ* and *Digest*)
  - to the *Codex*: constitutions *Haec, Summa, Cordi*
  - to the *Institutes*: constitution *Imperatorium*
  - to the *Digest*: constitutions *Deo auctore, Omnem, Tanta*/Δέδωκεν

B) Materials introducing Byzantine collections:

- the prooimion to the *Ecloga* (ed. Burgmann 1983,160-167)
- the prooimion to the *Eisagoge* (ed. Schminck 1986,4-11)
- the prooimion to the *Prochiron* (ed. Schminck 1986,56-60)
- the prooimion to the *Basilica* (ed. Schminck 1986,22; see also van Bochove 1997)
- the general prooimion to Leo's Novels (ed. Noailles and Dain 1944,4-9)

C) Other sections or structures of works consulted that I would consider broadly introductory in content include *CTh* 1; *Digest* 1.1-4 (and broadly book one); *Institutes* 1.1-2; *CJ* 1; *Eisagoge* 1-10; and *Basilica* 1-6

2) [from p. 85; also p. 27 nn. 2, 6; p. 147, n. 60] Major formal prologues preface four Byzantine canonical collections:

Collection	Introductory texts (and editions)
Coll50, c. 550	Prologue: Οἱ τοῦ μεγάλου θεοῦ (*Syn* 4-7) (Epilogue: the "Apostolic epilogue" (see above pp. 87-88), used to conclude the last title, may be considered to function as the collection's epilogue.)
Coll14 and later	Prologue I (c. 580): Τὰ μὲν σώματα.. (*Pitra* 2.445-447)

recensions, c. 580 and later	Prologue II (883): Ὁ μὲν παρὼν πρόλογος... (*Pitra* 2.448-450) Prologue IIIa (1089): Γέγονεν οὕτω καὶ ταῦτα... (Longer version by the σεβαστός Michael) (Schminck 1998,360-361) Prologue IIIb (1092): Γέγονεν οὕτω καὶ ταῦτα... (Abbreviated version by the βέστης Theodore) (Schminck 1998, 359)
Σύνταγμα κατὰ στοιχεῖον of Matthew Blastares, 1334/5	"Προθεωρία": Τὸ τῶν ἱερῶν καὶ θείων... (*RP* 6.1-30) This is the most comprehensive prologue in the tradition, borrowing extensively from earlier introductory material, and incorporating a synodal history.
Ἐπιτομὴ κανόνων of Constantine Harmenopoulos, c. 1346	"Προθεωρία": Τῶν κανόνων οἱ μέν εἰσι...(Leunclavius 1591,1.1 unpaginated) = *PG* 150.45-50)

Some smaller or supplementary collections also contain short prefaces:

Collection	Introductory texts (and editions)
Coll87, c. 550	Epigraph: Ἐκ τῶν μετὰ τὸν κώδικα... "Πρόλογος": Εἰς δόξαν τοῦ μεγάλου θεοῦ....(Heimbach 1838,2.280)
Σύνοψις τῶν θείων κανόνων of Arsenios of Philotheou, 12th or 13th C?	Short preface-heading: Παρακειμένων ἑκάστῳ καὶ τῶν ἁρομοζόντων... (Voellus and Justel 1661,2.749 = PG 133.9)

The three classical 12th C commentaries contain introductory structures; those of Zonaras and Balsamon are particularly extensive.

Collection	Introductory texts (and editions)
Aristenos, c. 1130	Epigraph: Νομοκάνονον σὺν θεῷ... (Zachariä von Lingenthal 1887,255-256)
Zonaras, after 1159	Epigraph: Ἐξήγησις τῶν ἱερῶν καὶ θείων.. (*RP* 2.1) "Προοίμιον": Ἡ δήλωσις τῶν λόγων σου...(*RP* 2.1-2)
Balsamon, in stages, c. 1177-1193	Introductory verses: Ἀστερες ὡς πολύφωτοι... (*RP* 1.1-3) Τὰς κανονκιὰς εὐσεβεῖς... (*RP* 1.3-4) Epigraph: Ἐξήγησις τῶν ἱερῶν καὶ θείων κανόνων... (*RP* 2:31) Prologue: Πείθεσθε τοῖς ἡγουμένοις ὑμῶν... (*RP* 2:31-33) "Επίλογος": Τὴν Μωσαϊκὴν ἀναμετρήσας πλάνην...(Horna 1903,201)

Two other introductory texts may be found in the manuscripts:

Text	Edition
Verses prefacing Rome Vallic. F.10, 10th/11th C century	Νόμος μὲν αὐτὸς ὡς κανὼν ὡς εὐθύτης... (*Pitra* 2.452 = *Sbornik* 244)
Epilogue following conciliar canons in Oxford Baroc.26, 10th/11th C	Ἰδοὺ προεγράφησαν οἱ τῶν ἁγίων ἀποστόλων... (*Sbornik* 318-319)

The broader introductory structures of many manuscripts – i.e. sets of articles near the beginning of the manuscripts, usually accompanying or interwoven with the collection prologues and tables of contents – have yet to be systematically studied.[1] We can tentatively suggest, however, that the most common introductory texts seem to be the Apostolic Epitome material, conciliar histories,[2] hierarchical lists of sees (τάξεις προκαθεδρίας),[3] and occasional doctrinal or liturgical articles.[4]

Within the corpus itself, a number of sources contain prologues, epilogues, or identifiably "introductory" canons.[5] These are Dionysius (epilogue); Gangra (synodical epistle, including epilogue); Antioch (synodical epistle); Gregory of Nyssa (prologue and epilogue); Basil (epistolary introductions to letters 188, 199, 218; canon 84 is also epilogue-like); Constantinople (προσφωνητικόν); Carthage 1 and 2 (and, more vaguely, the framing Apiarian dossier); Cyril 1; Chalcedon 1; Trullo (προσφωνητικὸς λόγος and canons 1 and 2), and II Nicaea 1. Similarly, *Coll14* 1.1-3, treating (1) theology; (2) which canons must be obeyed; and (3) the force of unwritten law – very much in imitation of the civil codices – may also be considered an "introductory" set of titles.

In addition, in the manuscripts, the sources are usually prefaced by short epigraphical notes, generally mentioning the name of the synod, its place, and sometimes the number of canons in the source, the number of fathers in conciliar sources, and/or a date. Judging from the current editions, and supplementary texts published by Beneshevich, these seem quite stable throughout the tradition, very often identical from manuscript to manuscript, although small variations and abbreviations may be found.[6] Sometimes they may be found prefaced by short extended historical

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[1] See, however, the items noted for the recensions in *Sbornik* 131-132, 192-193, 244-246; these are quite typical.

[2] Burgmann in 1999,611 suggests that these are to be found in almost all canonical manuscripts (alhtough not always in the introductions); certainly they are very common. See the data in *Sbornik, Sin* and Munitiz 1974, 1978.

[3] See for example that of Vatican gr. 640 published in Beneshevich 1927,131-155; more broadly Darrouzès 1981.

[4] See for example those in Cambridge Univ. Ee iv 29, Escorial X.III.2, Milan Ambros. E. 94 supp., Oxford Rawl G.1.58, Paris gr. 1263, Vatican gr. 640.

[5] Sometimes the epistolary introductions could be removed, e.g. in Oxford Rawl G. 158 – although here they are later re-added to the manuscript by a later scribe in a separate section. See also *Sources* Peter.

[6] For example, *Sin* Group A reads for Sardica "Canons of those gathered in Sardica after the fathers in Nicaea: in all, 21 canons", whereas Patmos 172 and Rome Vallic. F.10, from Beneshevich *Kormchaya*, omit "after the fathers in Nicaea" and add "The holy synod convened from different provinces in Sardica decreed the following ordinances." Similarly, many manuscripts of the first recension in *Sbornik* list the Apostolic canons as "canons of the holy apostles", but elsewhere they read as "the ecclesiastical canons of the holy apostles" (*Sin* Group A) or "the canons of the holy apostles issued through Clement" (e.g. Vatican gr. 1980). But such is the greatest extent of the differences. Most epigraphs are virtually identical, varying at most by a few words. Published epigraphs include those for the multiple recensions of the *Coll50* and *Coll14* in *Sin* and *Sbornik*; in Beneshevich's *Kormchaya*; in *RP*, *Pitra*; and in *Fonti*. In

prefaces or ὑποθέσεις; one set may be found in Beneshevich's Group A manuscripts of the *Coll50*, and the commentators provide another.[7]

Individual canons may also be prefaced by summary rubrics. Apparently fairly common in Latin canon law manuscripts,[8] the frequency of these rubrics in Greek manuscripts seems to be much more modest. From Beneshevich (*Kormchaya*, and descriptions in *Sbornik* and *Sin*), and much of *RP*, and my own examination of the manuscripts, they seem to be regular only in Carthage and II Nicaea. Joannou, however, has systematically inserted rubrics into the entire corpus. His principal source is Vienna hist. gr. 7, a rare reverse-index to the *Coll50*, published as the *Index Vindobonensis* by Beneshevich (*Syn* 191-223).[9] He has re-added these rubrics in the intriguing belief – not unlikely – that this manuscript preserves rubrics originally present in the Antiochian corpus, as they are often very close to Dionysius' rubrics (their relationship with the very early rubrics in London BL Syr 14528 remains to be investigated). Occasionally, however, the source of his rubrics is not entirely clear (e.g. Trullo, Hagia Sophia).

Finally, Michael Psellus' poem Περὶ νομοκανόνου καὶ τῶν τοπικῶν συνόδων (ed. Westerink 1992,77-80), must be mentioned because it is one of the very few extant descriptions of a canonical work, and it is intended to be introductory. One other description, in prose, and much simpler, may be found in Paris gr. 1182, published by Heimbach in 1838,2.299-300; cf. also the description of the "Ten Synods" in Florence Laur. 5.22, published in *Sbornik* 83 n.3.

3) [from p. 87, n. 21] ταῦτα καὶ περὶ κανόνων διατετάχθω ὑμῖν παρ᾽ ἡμῶν, ὦ ἐπίσκοποι. ὑμεῖς δὲ ἐμμένοντες μὲν αὐτοις σωθήσεσθε καὶ εἰρήνην ἕξετε, ἀπειθοῦντες δὲ κολασθήσεσθε καὶ πόλεμον μετ᾽ ἀλλήλων ἀΐδιον ἕξετε, δίκην τὴν προσήκουσαν τῆς ἀνηκοΐας τιννύντες. ὁ θεὸς δὲ ὁ μόνος ἀΐδιος ὁ τῶν ὅλων ποιητὴς ἁπαντας ὑμᾶς διὰ τῆς εἰρήνης ἐν πνεύματι ἁγίῳ ἑνώσει, καταρτίσει εἰς πᾶν ἔργον ἀγαθὸν ἀτρέπτους, ἀμέμπτους, ἀνεγλκήτους καὶ καταξιώσει τῆς αἰωνίου ζωῆς σὺν ἡμῖν διὰ τῆς μεσιτείας τοῦ ἠγαπημένου παιδὸς αὐτοῦ Ἰησοῦ Χριστοῦ τοῦ θεοῦ καὶ σωτῆρος ἡμῶν, μεθ᾽ οὗ ἡ δόξα αὐτῷ τῷ ἐπὶ πάντων θεῷ καὶ πατρὶ σὺν ἁγίῳ πνεύματι τῷ παρακλήτω, νῦν καὶ ἀεὶ καὶ εἰς τοὺς αἰῶνας τῶν αἰώνων. ἀμὴν. (ed. Metzger 1985,3.308-310)

RP they are sometimes missing (e.g. Ephesus, II Nicaea) and often in footnotes (e.g. Ancyra, Nicaea, Chalcedon).

[7] *Sin* 33-67; *RP* 1-4.

[8] cf. Fransen 1973,17, 33.

[9] Discussion in *Fonti* 1.1.8-10; cf. also *Fonti* 2.1.xxiii-xxiv. On Vienna hist. gr. 7's contents, *Sin* 108-126.

4) [from p. 90, n. 38; also from p. 91, n. 42] Οἱ τοῦ μεγάλου θεοῦ [c. 550]

The disciples and apostles of our great God and Saviour Jesus Christ, and also those bishops and teachers of his holy church who succeeded them and were like them [οἱ μετ᾽ ἐκείνους καὶ κατ᾽ ἐκείνους][10] were entrusted to shepherd in holiness the multitude of those from the Gentiles and Jews who had departed from diabolical deception and tyranny and had of their own accord come in right mind and faith to the King and Lord of glory. These men did not think it necessary, as the civil laws do, to harm wrong-doers (for this seemed altogether common and very negligent), but instead were zealous to brave dangers readily for their flock and to turn about those who were going astray. Like the Good Shepherd they ran without hesitation after any that were wandering or veering from the straight path, and they struggled to draw up by all manner of means those that have already fallen headlong into the pit. With great wisdom and skill they cut off with the knife of the Spirit that which was already putrid and very weakened, while that which was damaged and loosened [λύομενον] they bound with various soft medicines and rational dressings [δεσμοῖς λογικοῖς]. Thus by the grace and co-working of the Spirit they restored to their first health those who were ill.

In order that those who would succeed and be like them might preserve unharmed those ruled by them, each thrice-blessed generation [τούτων ἕκαστοι...οἱ τρισμακάριοι] has come together when the divine grace has ordained it, and each of their synods has gathered in assembly in order to issue certain laws and canons (not civil, but divine) on what ought and what ought not be done, thus reforming the life and manner of each. These canons bolster those who are journeying on the royal way, and penalize those who have fallen by the side.

Of old at various times laws and canons of the church have been issued by different men for different purposes and appropriate to different circumstances (for there have been ten great synods of the fathers after the apostles, and in addition to these Basil the Great ruled on many matters). Naturally, because of this, the canons have

[10] It is not entirely clear that κατ᾽ ἐκείνους should be translated in the sense "were like them", i.e. acted in a way "according to them", "following their manner". A more likely meaning may be "those at their time" (so Zaozerski 106: после них и при них бывшие and Pitra 375 *tam qui illorum temporibus, tam qui post illos fuere*). But this sounds rather odd, especially in the order of the phrase "those who came after them and those at their time" – thus Pitra's reversing of it! – and it makes little sense in this meaning later when it reappears in 4.14, if Beneshevich is right, with some of the MSS, to re-add the phrase here. The grammars do not seem to decide the question certainly, although the temporal meaning is probably more normal, especially with personal subjects (Kühner 1869,2.1.411-414; Schwyzer 1939,2.478-479; Smythe 1956,380).

been written by them in a scattered manner, as demanded by the emergence of matters at different times, and not in a subject-matter order, divided among chapters. As a result it is altogether most difficult to find in one place the materials sought on one rule. Because of this, by the grace of our Lord and God and Saviour Jesus Christ, we have undertaken to gather together into one place their scattered regulations from different times, and we have divided them into fifty titles. We have not preserved a numerical order and progression – joining, as it were, the first canon to the second, to the third, to the fourth, to the fifth, and so on – but rather, as much as possible, have harmonized like matters with like, and woven the same chapter together with the same, and so have made it easy for everyone, I think, to find without trouble that which they seek. We have not been the only or first to have applied ourselves to this task, but have found that others have divided the material into 60 titles, neither joining the canons of Basil to the others, nor harmonizing like subjects to like in titles. Because one [thus] finds many canons on one chapter and it is difficult to grasp all rulings on one subject, we have, as much as possible, made a clearer division of the canons by a juxtaposition of similar material, with, in addition, an inscription for each title which clearly indicates the content [δύναμιν] of the subsumed material.

The order of the synods after the apostles, and how many canons each issued, and how many also Basil the Wondrous composed, is easily determined from what follows – for thus presented it is clear and very easily discerned [εὐσύνοπτος] for those who wish to read it.

The holy disciples and apostles of the Lord issued through Clement 85 canons. After them were their successors, as is here below ordered.

The order of the synods.

1. Of the 318 fathers gathered in Nicaea in the consulship of the Illustrious Paul and Julian in the Alexandrian year 636 in the month of Desios before the 13th of the Calends of June: 20 canons.

2. Of the blessed fathers in Ancyra, whose canons were earlier than those of Nicaea, but which are placed second because of the authority, that is boldness [παρρησίαν], of the first ecumenical synod: 25 canons.

3. Of the holy fathers in Neocaesarea; this synod too was held earlier than Nicaea, and after Ancyra, but Nicaea, on account its honour, is placed before it: 14 canons.

4. Of the fathers gathered in Serdica after the fathers in Nicaea: 21 canons.

5. Of the fathers gathered in Gangra, by whom were issued 20 canons.

6. Of the fathers gathered in Antioch, by whom were issued 25 canons.

7. Of the fathers gathered in Phrygian Laodicea, by whom were issued 59 canons.

8. Of the fathers gathered in Constantinople, by whom were issued 6 canons.

9. Of the fathers gathered in Ephesus, by whom were issued 7 canons.

10 Of the fathers gathered in Chalcedon, by whom were issued 27 canons.

There are also canons of the great Basil, 60 and 8 in number.

5) [from p. 95, n. 53] Τὰ μὲν σώματα [c. 580]

Bodies partake, as is fitting, of material nourishment, and so flourish and grow until they reach the set limits in measure and duration to these increases. Likewise, the rational soul is watered and increased by kindred reason and grows spiritually: upon earth it seems to adhere to the body, but in many things it ascends towards higher visions [θεωρίας], and enters into the heavenly vaults, in no way subject to the limits of measure and duration. There, above, it converses and lives with the light-bearing powers and enjoys those things which are truly good, and not those that are in shadows.

Analogously it is proper here too [on earth] that the creator has allotted that which is limitless to the immortal part, and that which is perishable to the mortal. Therefore it is seemly that the always-moving element of the soul should ever accustom and attach itself to these limitless things, and not give opportunity to the soul to let go of genuine teachings and grasp hold instead of anything spurious. For if she [the soul] is occupied with good words and actions she will acquire divine visions [φαντασίας] in sleep and in dreams.

Considering these things, and applying a saying of an ancient pagan sage to the divine decrees, "convinced that they are a discovery and gift of God, the dogma of prudent and God-bearing men, the correction of willing and involuntary sins, and a secure rule for a pious way of living that leads to eternal life", I have with zeal attempted to gather into one the God-befitting canons issued by the holy ten synods, which were convened at various times, and whose canons serve for the strengthening of the divine dogma and for sound teaching of all men. I have placed the canons of each synod under the name of that synod. Furthermore, I have included the canons called "of the Holy Apostles", even if some believe them to be doubtful for certain reasons. I have also joined to the present work the sacred synod of Lybian Carthage that took place in

the time of Honorius and Arcadius of pious memory. I have found that it decreed many things able to introduce much that is useful for life, even if some of them only refer to local matters and order and some are inconsistent with regulations issued both generally and specifically and the ecclesiastical order prevailing in the other dioceses or provinces. (One of these is the definition that those enrolled in the clergy above the rank of readers must abstain in every way from their spouses lawfully wedded before their ordination. Among us it is not by command, but by free choice it falls to each person to practice either abstention on account of God-loving ascesis or undefiled intercourse on account of the honour of marriage – in neither case liable to any sort of just reproach.)

I have also thought it good to make mention of the things piously spoken in personal letters, in questions and answers, by some of the holy fathers, and that are in a certain way able to provide a kind of canon [τινα τρόπον κανόνος τύπον παρέχεσθαι]. I am not ignorant that both the great Basil and Gregory thought it right that one ought to call and judge "ecclesiastical canons" only those regulations which have been decreed not by one person by himself but by common assent and with careful examination by many holy fathers gathered together in one place. However, I have considered that the pronouncements of these teachers either concern things already spoken of in synods and so introduce something very useful for the clarification of those things that, apparently, seem to be hard to grasp for some; or they concern entirely new subjects which are in no way, in letter or meaning, present in the synodical enquiries and decisions – and I consider that those who have been so appointed judges of such things from the worthiness of their persons and from the spiritual light which according to the energy of God blazes forth in these men, that these are able to produce decisions that are not only unimpeachable but indeed extremely praiseworthy.

I have therefore brought together the content [τὴν δύναμιν] of all of the amassed material into fourteen titles, and divided each of these into different chapters. Under these I have then placed the regulations appropriate to each inquiry, making clear both the name of the sources where the regulations are found and the number through numerical figures. In this way I have, I think, produced a collection that allows for the easy discernment of the content of the material [εὐσύνοπτον ὡς οἶμαι κατὰ δύναμιν τὸ σύνταγμα πεποίημαι]. The reason that I have presented the material in this form – I mean, with numerical references, and not placing the appropriate word-for-word text under each chapter – is that I did not wish (on account of the needs of different

inquiries) either to write out many times the same canon and make the work bloated for readers, or to cut up and divide one canon that pertains to multiple chapters (which has been done by some in the past) and to then become liable for such fractioning to the just charge of ill-blessed license among some [καὶ δικαίαν οὐκ εὐλόγου με τόλμης ἐπὶ τῇ τοιαύτῃ κατατομῇ παρά τισιν αἰτίαν ἀπενέγκασθαι].

If anywhere I have found that the civil legislation is usefully related to such canonical writings I have arranged from it under appropriate chapters in a separate section of this book short and concise extracts of regulations. In this way I have put together in a collection a brief exposition of those regulations in both the imperial decrees and the interpretations of the jurists that pertain to ecclesiastical good order and that serves as both an *aide-mémoire* and for the full discovery of these regulations by the reader. If I achieve my goal to provide something useful first for myself, but also for others, may I, with God, helped by the prayers of the saints, receive the reward of my eagerness and zeal.

Ὁ μὲν παρών [883]

The present prologue [i.e. τὰ μὲν σώματα] set forth as its goal to gather into one the canons issued from the time when the Christian teaching in the voices of the apostles unfolded into the whole world until the fifth synod. The accomplishment of the things promised has been brought to a not unworthy conclusion. It has brought together into one the canons that the fifth synod and the proceedings synods decreed, and, if the interval of this time has shown some other individuals among the sacred men to have arrived at such a height of virtue that they have been deemed trustworthy and their words have come to be recognized as equal in honour and order to the canons, it has not rejected their works as adulterating that which is appropriate to this present task.

The time after the fifth synod has brought forth not a few other novelties in life and has seen the convening of sacred synods for various reasons. We, however, not wishing to inflict indignities upon the works of the ancients – a rash act which many have been frequently driven to by the lack of recognition for their own works and which is meant to give the appearance of wisdom to the theft of others' works [καὶ κλοπῇ τῶν ἀλλοτρίων ὀφρὺν ἀνασπάσαι σοφίας ἠπάτησεν] – have instead lifted up in admiration and praise those who have made a beginning of any good thing in life, and thus we recognize as honoured those whom we follow.

Therefore, maintaining inviolate the preeminence of the labours of these men, indeed increasing them, we have attached to what has gone before the things that have come after. What time has denied to them, we restore with addition (providing damages, as it were) [ταύτην αὐτοῖς ἡμεῖς τὴν πρσθήκην, ὡς ζημίαν, ἀποκαθιστῶντες] and we present to them this labour of love now complete with all that has transpired until the present.

The present book therefore contains all that the [first] prologue has described, as well as, in the same sequence, and in the same order of composition that those before us devised, the regulations which the sixth ecumenical council defined; and further those of the seventh ecumenical council, which holds the second place of those convened in Nicaea, and which condemned the iconoclastic madness and composed not a few ordinances of those that rectify the sacred way of life [τὴν ἱερὰν πολιτείαν]. In addition, it contains those regulations decreed afterwards by the first and second synod in Constantinople, which, when a certain strife was kindled, made the all-sacred temple of the apostles its hearing-chamber for these affairs. Further, it contains those of a later synod which, convened for the common harmony of the church, sealed the synod in Nicaea, cast out all heretical and schismatic error, and added its canons to those of its brother synods.

This here-mentioned labour of this book has also everywhere joined to the sacred writings certain legal excerpts – not neglecting their addition – which are in harmony with the sacred canons.

In order that one might know the year when the present material was added to the earlier, it is counted in thousands of years, increased six-fold, and exceeding even this, not stopping its course at three hundred more years, but driving on to the ninety-first year – this is the year that brought forth this present work under the sun's rays.

6) [from p. 97, n. 63] οἱ δὲ νόμοι τὸ δίκαιον καὶ τὸ καλὸν καὶ τὸ συμφέρον βούλονται, καὶ τοῦτο ζητοῦσιν, καὶ ἐπειδὰν εὑρεθῇ, κοινὸν τοῦτο πρόσταγμ᾽ ἀπεδείχθη, πᾶσιν ἴσον καὶ ὅμοιον, καὶ τοῦτ᾽ ἔστι νόμος. ᾧ πάντας πείθεσθαι προσήκει διὰ πολλά, καὶ μάλισθ᾽ ὅτι πᾶς ἐστι νόμος εὕρημα μὲν καὶ δῶρον θεῶν, δόγμα δ᾽ἀνθρώπων φρονίμων, ἐπανόρθωμα δὲ τῶν ἑκουσίων καὶ ἀκουσίων ἁμαρτημάτων, πόλεως δὲ συνθήκη κοινή, καθ᾽ ἣν πᾶσι προσήκει ζῆν τοῖς ἐν τῇ πόλει. *Against Aristogeiton 1* 16 (ed. Butcher 1907).

7) [from p. 101, n. 72; also from p. 217, n. 48] The divisions and repetitions in the *Coll50* are quite limited (although in most cases there are variations across the manuscripts; the following is derived from the main text of *Syn*). Nicaea 6 is divided between titles 1 and 7; Serdica 3 is divided between title 3 and 16, Serdica 11 is cited in full in title 3 and a relevant extract in 47; the second part of Serdica 21 is cited in full in title 13 and the first part in title 48; Gangra 20 is cited with epilogue in 32 and without in 47; Antioch 2 is divided between titles 18 and 47; Basil 20 is repeated in full in titles 32 and 41; and Basil 62 is repeated in full in 41 and 44 (because it contains the penalty referred to in Basil 63 in this last title). In every case the divisions are very logical, and follow clean divides within the canons themselves (i.e. the canons address two different issues or contain two rules). The only true repetition is Basil 20 (on the case of a woman who leaves her husband), which seems to have been repeated because of uncertainty about whether or not it refers to monastics in particular (because of the presence of the verb ἀναχωρέω), or is more general in scope – thus it is repeated under a monastic title, and a more generic marriage title.

8) [from p. 105, n. 84] ...[the fifth and sixth council did not write canons] δι᾽ ὧν ἀποστήσονται οἱ λαοὶ τῆς χείρονος καὶ ταπεινοτέρας διαγωγῆς ἐπὶ δὲ τὸν κρείττονα καὶ ὑψηλότερον μεταθῶνται βίον· ἐντεῦθεν τε τὸ ἔθνος τὸ ἅγιον τὸ βασίλειον ἱεράτευμα, ὑπὲρ οὗ Χριστὸς ἀπέθανεν, ὑπὸ πολλῶν ἐξ ἀταξίας παθῶν διασπώμενον καὶ ὑποσυρόμενον καὶ κατὰ μικρὸν τῆς θείας μάνδρας ἀπορραγὲν καὶ διατμηθὲν καὶ τῇ ἀγνοίᾳ καὶ λήθῃ τῶν τῆς ἀρετῆς κατορθωμάτων ἀπολισθῆσαν καὶ ἀποστολικῶς εἰπεῖν τὸν υἱὸν τοῦ θεοῦ καταπατῆσαν καὶ τὸ αἷμα τῆς διάθκης ἐν ᾧ ἡγιάσθη κοινὸν ἡγησάμενον τὴν τοῦ πνεύματος ἐνύβρισε χάριν. (ed. Nedungatt and Featherstone 1995,52.3-20)

APPENDIX C
Appendix to Chapter 3

(The following are supplementary notes, supplying further details, texts and examples for various points in the main text. These notes are referred to in the main text and/or footnotes by appendix and note number.)

1) [from p. 145, n. 53] The lack of extensive study of ὅρος comparable to that devoted to κανών makes speculation difficult. Schwartz' suggestion (1936a,177 n.3; 193) is still perhaps the best: that the term ὅρος eventually become associated with doctrinal statements, and the need to distinguish doctrinal from disciplinary material meant that its continued use for the latter became inappropriate. At Chalcedon there is also an instance in which ὅρος, in the midst of a heated debate, is explicitly distinguished from a κανών, although the nature of the distinction is far from clear (*ACO* 2.1.1.91; cf. Price and Gaddis 1.157 nn. 111, 112). Suffice to say that a qualitative difference does not seem to have been well established.

The theory of Erickson 1991a and above all Ohme 1998, adopted by Hess 2002, discussed above, that the shift from ὅρος to κανών is part of larger change in fundamental legal thinking is intriguing, but not entirely convincing. Ohme develops the theory with great subtly, but here we can offer only a few preliminary considerations that should make us *prima facie* nervous about embracing it too rapidly.

First, to a degree to which Ohme and others do not take into account, ὅρος and κανών are very frequently used in Greek literature as synonyms, and often in *hendiadys* constructions. A *TLG* search will reveal over a hundred such instances, including – to take a few examples – Demosthenes *De coronoa* 296; Aristotle *Protrepticus* Frag. 39.1; Dionysius Halicarnassensis *De Lysia* 18.4; Philo *De Specialibus legibus* 3.164; Gregory of Nazianzus *Apologetica* 35.477; Basil *Sermon* 13 (31.876). Oppel 1937,28-29, 51-72 thus tends to treat them as more or less synonyms. Even in Roman law literature ὅροι and κανόνες (*definitiones* and *regulae*) are sometimes very nearly synonyms (Schulz 1953,66-67, 173; Stein 1966,65-73 *et passim;* 1995,1553-1554) (And note that ὅρος thus has its own perfectly "legal" valence, as does κανών. To try and plot κανών language as some type of *further* assimilation to Roman law language on purely terminological grounds is thus questionable.) To suggest then that calling a rule ὅρος in the 4th C, and κανών in the 5th C is indicative of a deeply significant and clear shift in fundamental legal theory – or that a change in theory caused this terminological shift – is thus not an immediately likely proposition. Certainly any important formal source

distinction embedded in these terms would be surprising, and in need of very explicit proof.

In fact, when we examine the canons, it is curious that in much earlier material ὅρος and κανών can be read very easily as synonyms in the *same texts* – for example in Carthage *acta* 1, Chalcedon 28, or much of Antioch. Likewise, general, synthetic senses of ὁ κανών can easily be juxtaposed with more specific, positivistic senses of the term (e.g. in Gangra or Antioch, perhaps in Nicaea). Both of these facts suggest a much looser, "messier" semantic world than Ohme's distinction requires.

Further, it is not helpful that, as far as I am aware, no where is ὅρος explicitly distinguished from κανών as somehow a secondary expression or realization of the latter – or indeed, even explicitly defined as an episcopal enactment *per se*. This relationship and distinction is only inferred from the fact that in the earlier material ὅρος tends to mean a more positive-like enactment, used for present legislation, and κανών tends to appear in more abstract, synthetic senses as "general tradition". Strictly, though, this only reveals the presence of these two concepts, i.e. of a concrete written rule and of a broader sense of normativity, and not an investment of a rigid and qualitative doctrinal legal-theoretical source distinction embedded in the very terms themselves – or in the relationship between the two. It is perfectly possible for these concepts to exist together expressed by a more varied vocabulary. In other words, the idea that specific rule enactments must remain anchored in broader narratives of normativity – the idea that ὅρος-κανών distinction is supposed to embody – does not *require* ὅρος-κανών vocabulary. As such, the disappearance of this language does not necessarily imply the loss of these concepts, and, thus, conversely, the loss of these concepts cannot be proposed as a reason for the shift from ὅροι to κανόνες, as Ohme's theory seems to wish.

Finally, it is a little curious that such an unusually distinct and dogmatic conceptual-terminological division between positive legislative enactments (ὅροι) and traditional rules (κανόνες/ὁ κανών) existed in the 4th C but then seems to have so entirely dropped from view that only in the 20th C has it been recovered (for the later tendency to equate easily the two terms, see e.g. Zonaras *RP* 2.159; 3.306, 308). More likely it never existed at all; or rather, was but one way at one time of indicating a basic concept – the embedness of church regulations in broader Scriptural and Apostolic traditions. This is a concept that will always remain basic to church law.

2) [from p. 147, n. 59] The Apostolic canons are among the most variable, existing without numbers in the oldest known Latin translation (the *Fragmentum Veronese*), and when enumerated often showing considerable variation in order and number of canons in the manuscripts – both within the Greek tradition, and across the Latin, Greek and Syrian versions (see *Fonti* 1.2.4-7; Metzger 1985,3.12; *Pitra* 1.43-44; *Sin* 63 n.2; *Sources* Apostles; Steimer 1992,92; Turner 1936,1.2.1.370-371). Clearly gradual and varied processes of enumeration took place.

Gradual processes of extending enumeration may be also inferred from the fact that some elements in the corpus exist in different parts of the tradition both with and without numbering. The best examples are the additional *acta* extracts or decisions appended to Constantinople (canons 6 and 7), Ephesus (canons 7-9) and Chalcedon (canons 28-30), as well as the final canons in Carthage (135-138). All evince considerable irregularity in the manuscripts and thematic indices, sometimes not enumerated at all (or simply not included), sometimes numbered differently. Similarly, Gregory Thaum. seems to be cited as an undivided whole in the *Coll14* (Title 13.13), although it is sometimes divided and enumerated in the corpus sections. Likewise, Basil's "canons" beyond the three principal letters (after 86) tend to be cited in the *Coll14* by epistle addressees, and not numbers – despite (sometimes) possessing numbers in the corpus sections of the manuscripts.

The letter constituting Constantinople 1-4, on the other hand, is a good witness for variation in post-production division and enumeration. The same text appears divided into only 3 canons in Dionysius (I and II, presumably following a Greek original; *Historike* 26), but four canons in the mainstream Greek tradition.

Many of the other councils (Nicaea, Ancyra, Gangra, Laodicea, Serdica, Carthage, even Trullo, which can end up with 101-103 canons) also show slight variations in numbering and ordering, usually caused by different divisions of canons.

No exhaustive study of corpus enumeration has yet to be produced, but these and many instances of variation are remarked *passim* in *Fonti*, *Historike*, *Kormchaya*, *Sbornik*, Schwartz 1936a (cf. also 1911,324-326), *Sin, Sources* and Turner 1936

3) [from p. 147; also from p. 39, n. 66] The first two genres are by far the most dominant, and evince the most variation.

The conciliar canons exist in three forms in the Greek manuscripts: 1) simple lists of regulations, with little or no introduction; 2) canons affixed to, or constituting, a

synodical letter; and 3) extracts of records of conciliar *acta*. Ancyra, Neocaesarea, Nicaea, Laodicea, Chalcedon, II Nicaea and the two Photian councils belong to the first group; Cyprian, Gangra, Antioch, Constantinople 1-4 (and in appearance 5-7), Ephesus 1-6, and Trullo to the second. The only sustained examples of the last are the two "western" sources, Carthage and Serdica, much of which read as stenographic records of conciliar proceedings in the form Hess calls *dixit-placet* (εἶπεν-ἤρεσεν).[1] Carthage, however, is quite varied, containing a variety of different conciliar forms and texts, including letters and resolutions, all framed by excerpts of conciliar minutes, and encompassed by a case dossier. Also in the form of an *acta* record or decision (ψῆφος, διαλαλιά) are Constantinople 394 (*acta*); Ephesus 7- 9 (decisions and a synodical letter), Chalcedon 28-30 (a decision and two *acta* extracts).

The Apostles may be regarded as either a proprietary "apostolic" genre – as the tradition seems to treat it – or as a variant of the first type of conciliar document (i.e. as an "apostolic council", as presented when part of Book 8 in the as Apostolic Constitutions)[2].

It is possible that some of the examples of the first two groups were originally in a form closer to the third, and what remains in the canonical collections reflects various levels of extraction from original parliamentary scaffolding. There is no clear evidence of this happening on a regular basis, however, or even that they represent the results of real parliamentary processes.[3] It is particularly interesting in this regard that in Chalcedon and II Nicaea, for which extensive *acta* are extant, the canons stand noticeably outside of the main body of record, precisely without much notable parliamentary framing or even discussion. This suggests that they were composed as an independent list, perhaps by a special committee, and later approved.[4] Trullo does not have extant *acta* beyond the subscription list and προσφωνητικὸς λόγος, and it is far from clear that they ever existed.[5] In Protodeutera, for which no *acta* are preserved, the

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[1] Hess 2002,24-27, 61-89.
[2] See Metzger 1995,34-35; also *Sources* Apostles.
[3] cf. Hess 2002,69-72, who is more inclined to see canons with *placuit*, ἔδοξε, ὁρίζω or similar vocabulary, at least of the first wave, as the product of real editing from earlier parliamentary forms. This is possible, and perhaps in some cases even likely, but there is little direct evidence of it. *Placuit*-like forms are quite generic Greco-Roman legislative forms, and cannot on their own be read as definitive evidence for a text's earlier existence in a parliamentary record.
[4] On Chalcedon, and particularly on the idea that the 27 canons were composed by a small and separate committee, and perhaps never even formally approved, see Price 2005,1.81 n. 277, 3.92-93. Certainly the canons do not seem to belong to any formal session, instead tacked on in various places in the different versions of the *acta* (Price 2005,1.xiv). The canons of II Nicaea likewise are simply tacked on to the final, eighth session of the council, with little comment; see *Historike* 314-317.
[5] The point is debated, see Gavardinos 42-49; *Historike* 285-286; Ohme 1990,25-27.

presence of small narrative resumptives among the canons also suggest that the rules were originally written as a complete separate composition, as they now stand.[6] Only the three canons of Hagia Sophia may be found embedded in the council's *acta*, including with *dixit-placet* structures – although they were clearly pre-composed, "read" by the archdeacon.[7]

One division in general style among the conciliar legislation is sufficiently prominent as to amount almost to a difference of genre: the second wave legislation tends to be longer, more rhetorically elaborate, more inclined to scriptural and patristic citations, and more interested in lengthy justifications and explanations than that of the first wave. It is at times almost homiletic in tone.[8] This distinction is always more quantitative than qualitative, and admits many exceptions,[9] but the first wave legislation is generally shorter, simpler, and plainer.

The patristic material shows even more variation than the conciliar legislation, although most sources are letters or letter-like, and are written as responses to specific inquiries. A key characteristic of these texts is that most, if not all, are consciously written to address specific disciplinary rule problems, and as such are expressly and specifically rule-texts.[10] In this respect they are closely akin to the papal decretals, yet unlike much of the later patristic material that appears in western collections in the 8th C. This latter represents the results of a processes of "mining" much more general doctrinal, exegetical, homiletical or other types writings of the fathers – not originally written as rule texts – for rule content.[11] Such patristic rule-mining is much less evident in the eastern tradition, if not entirely unknown.[12] The eastern pattern is

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[6] *Fonti* 1.2.458.19-459.2; 474.13-475.16.
[7] *Mansi* 17.494-500.
[8] Good examples include Trullo 45, 96; II Nicaea 2, 4; Protodeutera 10.
[9] For example, Nicaea 12,18, Constantinople 6, and Chalcedon 4 are quite long; Ephesus 8 is quite elaborate (although it is a formal ψῆφος). Likewise, Trullo 15 and 58, both original canons, or Hagia Sophia 3, are quite short and concise.
[10] For example, Basil's three classical canonical letters to Amphilochius are each a series of rules, and each of his individual letters addresses a specific disciplinary matter as its primary concern; Peter is an oration "on repentance" but is nevertheless almost entirely written as a set of rules addressing specific problems; Gregory of Nyssa is a systematic exposition of penance that is likewise almost entirely taken up with reviewing traditional penitential rules; Theophilus is a series of administrative rulings; Timothy is a set of rules in the form of "answers"; and so forth.
[11] The earliest major example is the Hibernensis (c. 700; ed. Wasserschleben 1885, and see Sheehy 1989), although this activity does not seem to have become exceptionally common until the 11th C. See especially Munier 1954; also Fransen 1973; Maassen 1871,348-382. For the definitive western selection in Gratian, see Friedberg 1879,1.xxxi-xxxvii.
[12] For example, Peter 15 "from his treatise on Pascha"; the excerpts from Basil's *On the Holy Spirit*; the two Scriptural canon poems; perhaps Athanasius to Ammoun and Theophilus 1. Most are comparatively late additions to the corpus. See also the more marginal patristic appendix items in *RP* 4.389-391 and *Fonti* 2.187-191.

overwhelmingly to gather into the corpus more or less established and traditional rule-writings, unextracted, and un-edited; the western tradition is doing something more creative, scouring non-rule texts for rules.

The majority of the patristic material may be loosely termed episcopal letters, generally from a bishop to some type of underling or underlings, including new or less knowledgeable bishops, and in response to various difficulties or questions.[13] In their manuscript prefaces, and/or in the *Coll14* source listing ἐκ ποίων, they are usually termed either simply "letter" (ἐπιστολή)[14] or, most often, "canonical letter" (ἐπιστολή κανονική)[15] – when a term is supplied at all.[16] One canon is presented as from a festal epistle (ἑορταστική)[17], and one is termed encyclical (ἐγκύκλιος).[18]

The tone of the letters can vary from brotherly and advisory (e.g. Dionysius), to paternal and didactic (the most common; e.g. Basil to Amphilochius, Gregory of Nyssa, Timothy, Athanasius to Rufinianus), to administrative (e.g. Theophilus 2-11), to excoriating and admonishing (e.g. Basil to Paregorios or to "his bishops"[= canons 88, 90]). Some are written in a relatively discursive, occasionally meandering style, with considerable explanation, justification and scriptural citation.[19] Others read more as a straightforward citation of traditional rules,[20] while at least one, Gregory of Nyssa, should be considered a small systematic treatise in the guise of a letter. One source, the ὑπομνηστικόν of Theophilus, as its name suggests, is a much more technical registry of episcopal chancery administrative missals that briefly decide or provide for the decision of very specific matters referred to him (ὑπομνηστικά) in his jurisdiction.[21] Theophilus 13 and 14 are very similar in shape, as are Cyril 4 and 5. Gennadius, although listed under the patriarch's name in the patristic material, is a general synodical encyclical subscribed by a Constantinopolitan ἐνδημοῦσα synod. As such, it is the only specimen in the corpus of a genre that is quite important in the canonical tradition after the 9th C, (although Tarasios is close).

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[13] Peter, Gregory Thaum., Gregory Naz. and Amphilochius are without addressees. Cyril to Domnus of Antioch, although from one great see to another, is written as from a senior bishop to a junior. Tarasius, to pope Hadrian, is the only source written to a superior.
[14] Basil 86 to Amphilochius, Theophilus to Menas, Cyril to Domnus, Cyril to the bishops of Lybia and Pentapolis, Athanasius to Ammoun and Rufinianus.
[15] Dionysius, Gregory Thaum., almost all of Basil's epistles, Gregory of Nyssa, Theophilus to Aphyngios, Tarasios.
[16] In the manuscript prefaces one will often find a simpler form of τοῦ αὐτοῦ πρὸς... or τοῦ αὐτοῦ περὶ.... This is especially true of Basil's letters, and some of Cyril and Theophilus.
[17] Athanasius 2.
[18] Gennadius.
[19] Chiefly Dionysius, Gregory Thaum., Peter, Athanasius, some of Basil, Gennadius, Tarasius.
[20] Much of Basil's three canonical letters to Amphilochius.
[21] See Dölger 1968,82.

A very few patristic canons are not letters, or at least, not clearly. One formal ἐρωταπόκρισις, for example, has made its way into the corpus: the answers (ἀποκρίσεις κανονικαί) of Timothy to "various" bishops and clerics, given at the council of Constantinople 381. This genre will see considerable development in the post-corpus material.[22] Theophilus 1 is listed as a προσφώνησις, a public address. Peter of Alexandria' lengthy and involved tract is presented as κανόνες φερόμενοι ἐν τῷ περὶ περὶ μετανοίας αὐτοῦ λόγῳ -- i.e. in a λόγος or treatise.[23] Likewise Peter 15 is presented as an extract from his λόγος on Pascha (Peter 15). Basil 91 and 92 are identified as from chapters 27 and 29 of his "writings" (γεγραμμένων) *On the Holy Spirit*. The two canons in verse-form in the corpus, Gregory Naz. and Amphilochius, are presented respectively as ἐκ τῶν ἐνμέτρων ποιημάτων, and Amphilochius as ἐκ τῶν πρὸς Σελεύκον ἰάμβων. (Their verse form, exceptionally curious for "legal" texts, is undoubtedly mnemonic in intention.) A few other examples of non-letters may be found in the common para-canonical patristic material just outside of the corpus proper, namely a few excerpts from John Chrsysostom's *On the Priesthood* and his exegetical works, as well as a short sermon of St Basil on the priesthood.[24]

4) [from p. 155] For example, ἀποφαίνομαι (e.g. Dionysius 1, Gregory Nyss. 5), ψηφίζω (Chalcedon 28, a ψήφος), θεσπίζω (Trullo 1, 8, Hagia Sophia 1), τυπόω (Basil 1, Trullo 3), νομοθετέω (Basil 18, 88 Trullo 12, 26, 36, Protodeutera 1), θεσμοθέω (Trullo 81), ἐπιτίθημι (Peter 5), τίθημι (Basil 8, Protodeutera 17), ἐκτίθημι (Basil 17, 51), διατίθημι (Basil 18), κρίνω (Basil 21, 24, 52, Gregory Nyssa 2, 5, Cyril 1), ἐκφέρω (Basil 81) διορθόω (Basil 90), καταδικάζω (Gregory Nyssa 7), δικάζω (Cyril 1), συνοράω (Trullo 3, 28, 33, 37, 39, 54), βούλομαι (Trullo 75), or θεραπεύω (Trullo 96).

5) [from p. 164] Other procedure-oriented instances of legalese include κινέω and κινέω παρὰ (in the sense of instituting a lawsuit, originally probably a direct translation of *actionem* or *litem movere*)[25]; παρανοχλέω or ἐνοχλέω (in the sense of *impetrare*, impetrating the emperor),[26] ἀναφέρω/ἀναφορά (=*suggestio/relatio*),[27] ὑπόθεσιν

[22] *Peges* 250-255.
[23] Although this "treatise" is really an encyclical letter, a point clearer in the Syriac, where more of its original heading has been preserved. *Sources* Peter.
[24] *RP* 4.389-392.
[25] E.g. Nicaea 9; Carthage 19; Chalcedon 17. See Avotins 1989,87-89.
[26] Antioch 11, 12. In these cases, however, it is quite possible that the terms are meant in their more generic sense of "bother, annoy", which does often fit the context (and the Dionysian translation of Antioch 11 and 12 uses *molest-* roots).

γυμναζείν (γυμνάζειν here as a calque of *exercere*, as in *exercere actionem/iudicium/litem*),[28] ἐνίστασθαι τὰς κατηγορίας/τὴν κατηγορίαν (=*institutere/deferre accusationem*),[29] ἐκδικέω (in its legal sense as "claim", i.e. as a translation for *vindicare*),[30] πράγμα ἔχειν πρός τινα (πράγμα here as a technical legal denotation of the formal object of a case, in the sense of *qua de re agitur*);[31] τὰ τῆς δίκης συγκροτεῖσθαι (to discuss the matter, perhaps similar to *agitare causam*);[32] ἐκφέρειν ὅρον/ψῆφον/ἀπόφασιν (here I think akin to *sententiam proferre*);[33] ἐμφανεία συνοδική (synodical court "appearance");[34] and, in Ephesus 8, perhaps, a technical usage of διδάσκω (in a Greek and Roman sense of "teaching" the court one's position, here διὰ λιβέλλων).[35]

Another more generic technical-legal term is (ἀ)κύρος/(ἀ)κυρόω, corresponding to the common Latin *ratus*/*irritus* of Roman law, i.e. the language of validity and confirmation. Thus, for example, in Nicaea 4, we read of τὸ δὲ κῦρος τῶν γίνομένων δίδοσθαι...τῷ μητροπολίτῃ ἐπισκόπῳ.[36] Not every instance of this term should be regarded as an assertion of a complex technical doctrine of validity (it can simply mean "approval" or "firm"), but a formal sense of "validate" or "ratify" is often strongly suggested. In Serdica 15 it is paired with ἀβέβαιος, lending any even more categorical and "official" tone: ἄκυρος καὶ ἀβέβαιος ἡ κατάστασις ἡ τοιαύτη νομίζοιτο. The term βέβαιος, *firmus*, can itself take on technical connotations.[37]

Another obvious borrowing is the technical language of ἐκποίησις, the normal translation for *alienatio*.[38] Likewise, a technical property phrase may be found in Protodeutera 8, προσκυρόω, to transfer ownership or assign, here found in a highly

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[27] Mostly in Carthage, e.g. *acta* following canon 48, 64, 100; also somewhat more loosely in Chalcedon 28. See Roussos 1949,45.
[28] Chalcedon 9. See Avotins 1989,30-31; Berger 1953,462.
[29] Constantinople 6. Berger 1953,504; cf. Roussos 1949,176.
[30] Nicaea 9 (perhaps); Serdica 14; Basil 1. See Pitsakis 1971,397; Roussos 1949,156. The term also has a more general legal sense of "exacting punishment for, avenging", as in Basil 2 ἐκδικεῖται οὐ μόνον τὸ γεννηθησόμενον, ἀλλὰ καὶ αὐτὴ ἡ ἑαυτῇ ἐπιλβουλεύσασα.
[31] In Serdica 3, 5, 14; Chalcedon 9. See Berger 1953,662, 676, and esp. *Digest* 50.16.23.
[32] In Chalcedon 9. See Roussos 1949,408.
[33] Serdica 4, 5, 20. See Berger, 1953,701; Roussos 1949,164.
[34] See Avotins 1992, 79-80.
[35] Cf. διδασκαλικός Avotins 1992,63; Too 2001,111-113.
[36] Other examples may be found in Apostlic 76; Nicaea 15, 16; Antioch 13, 22, 23; Constantinople 1, 4; Ephesus 8; Chalcedon 6. Trullo 1, 2, 72; II Nicaea 3, 12; Protodeutera 11 It often refers to the validity of an ordination, as well as the validity of decisions. Sometimes, for example in Trullo 72 or 85, it reflects a civil law regulation (i.e. on validity of marriage or manumission).
[37] See in Basil 42; Chalcedon 30; Trullo 2, 37. See Pitsakis 1971,393; Roussos 1949,103-104
[38] Cyril 2; II Nicaea 12.

legalistic phrase: τὸ δὲ νεουργηθὲν [monastery], ὡς μηδὲ τὴν ἀρχὴν μοναστηρίου δίκαιον ἀπειληφός, ὡς ἰδιωτικὸν τῷ ἐπισκοπείῳ προσκυροῦσθαι.

The same council also contains one of the very few Latin loan words in the canons. Thus in its first canon we read of the need βρεβίῳ ἐγκαταγράφεσθαι (register with an official list); the term is derived from *brevis*.[39] The verb ἐγκαταγράφεσθαι also suggests "administrativese".

6) **[from p. 165]** Many of the penal provisions and repeated subject designators ("if a bishop, presbyter, or deacon....") are the best examples of repetition of formulae, but more particular examples may also be cited, such as Protodeutera 12, where we find the ponderous repetition of (almost) the same phrase three times: **τοὺς ἐν τοῖς ἐυκτηρίοις οἴκοις ἔνδον οἰκίας οὖσι λειτουργοῦντας** ἢ βαπτιζόοντας κληρικούς... ἀποκεκληρωμένους εἶναι **τοὺς ἐν τοῖς εὐκτηρίοις οἴκοις ἔνδον οἰκίας οὖσι λειτουργοῦντας**... **εἰς τὰς οἰκίας εἰσπίπτοντες ἅπτεσθαι τῆς λειτουργίας** ἀποτολμῶσι... Other times a formula in repeated across a few canons. For example, we read about actions committed διὰ νομιζομένην ἄσκησιν in Gangra 12 and 13, 17, 18.[40] This stylization conveys a strong sense of precision and categorical force.

A very simple legal stylization is the use of "aforesaid" phrases. Common in the secular legislation, the best example in the canons is Chalcedon 28: ἔτι δὲ καὶ τοὺς ἐν τοῖς βαρβαρικῆς ἐπισκόπους **τῶν προειρημένων διοικήσεων**, χειροτονεῖσθαι ὑπὸ τοῦ **προειρημένου** ἁγιωτάτου θρόνου τῆς κατὰ Κωνσταντινούπολιν ἁγιωτάτης ἐκκλησίας· δηλαδὴ ἑκάστου μητροπολίτου **τῶν προειρημένων διοικήσεων** μετὰ τῶν τῆς ἐπαρχίας ἐπισκόπων χειροτονοῦντος τοὺ τῆς ἐπαρχίας ἐπισκόπους καθὼς τοῖς θείοις κανόσι δηγόρευται· χειροτονεῖσθαι δέ, καθὼς ἔιρηται, τοὺς μητροπολίτας **τῶν προειρημένων διοικήσεων**... This highly officious and official manner of writings again strongly conveys a concern for rule precision; it is fairly common.[41]

Another stylistic tendency, often combined with pleonasm, is the production of hyperbolic categoricals. Ephesus contains a number of particularly good examples: in

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[39] See Avotins 1992,46.

[40] Other examples include the heavy repetition of "such and such bishop said" and πάλιν/ὁμοίως ὡρίσθη/ἤρεσεν in much of Carthage, the introductory περὶ... statements of Theophilus' ὑπομνήστικον, or even the repetition of "ἢ οὐ;"at the end of questions in Timothy 2, 4, 5, 7, 12, 15.

[41] For example, Laodicea 34; Antioch 4; Constantinople 394; Trullo 1, 2, 16, 19, 37, 39, 40, 41, 62; Protodeutera 16; Hagia Sophia 2. A similar phenomenon may be found in Chalcedon 23, where the official (the Constantinopolitan ἔκδικος, i.e. *defensor*) who is to handle the expelling of vagrant clergy is mentioned twice, the second time with the precisionistic form "the same" (διὰ τοῦ ἐκδίκου...διὰ τοῦ αὐτοῦ ἐκδίκου).

canon 3 we read that μηδ' **ὅλως** ὑποκεῖσθαι κατὰ **μηδένα** τρόπον ἢ χρόνον and in canon 9 ἐδικαιώσαμεν καὶ ὡρίσαμεν δίχα **πάσης** ἀντιλογίας.

7) [from p. 166] Chalcedon 27 condemns not only those who participate in seizure-marriages, but those who are party to the plan: συμπράττοντας ἢ συναιρομένους. II Nicaea 8 on fake Jewish conversions is quite careful to note that such Jews may not a) take communion; b) participate in prayer; or c) enter into a church. Further, they may not baptize their children or either buy *or* possess a slave. Hagia Sophia 3 officiously condemns anyone who strikes *or* imprisons a bishop without reason *or* for a contrived reason : εἴ τις...τολμήσειεν ἐπίσκοπόν τινα τύψαι **ἢ** φυλακίσαι **ἢ** χωρὶς αἰτίας **ἢ** καὶ συμπλασάμενος αἰτίαν. Gangra frequently addresses in different canons slightly different circumstances for the same rule: canons 14-16, on familial duties, carefully moves through different types of kin, one after another; canons 1, 4, 9, 10, 14 all treat various detailed circumstances that emerge because of the ascetic disdain for marriage; something similar is evident with 5, 6, 9, 20 on church assemblies, and 7 and 8 on finances.[42]

Another version of this type of comprehensive provisioning arises when extended series of "stacked" conditional clauses expand a rule with a variety of fairly specific additional possibilities. Ancyra 18 is a good short example. The basic rule is that if certain bishops (εἴ τινες...) are rejected from his own church, they cannot interfere in other dioceses. The canon continues, however, by noting that if (ἐὰν μέντοι...) such a bishop will accept a seat among the presbyterate, he is welcome to take such a position. But it then adds an even further clause that if (ἐὰν δὲ...) such bishops then engage in any seditious activity, they will be expelled. This phenomenon may be found throughout the corpus.[43]

8) [p. 167] Trullo 49 may be trying to close a potential loophole when it cites, word for word, Chacledon 24, against the transformation of monasteries into secular habitations, but then also adds that monasteries may not be *given* to seculars either. Canon 67, which repeats the food prohibitions from Acts 21:25, may be meant to supercede Apostolic 63, which included also a number of other food prohibitions from Leviticus 17:14-15. Canon 90 gives more precise indications of what exactly kneeling "on

[42] Other similar examples include Apostles 22-24, 42-43, 72-73; Ephesus 1-6; Serdica 3-5.
[43] E.g. Apostles 74; Antioch 3; Constantinople 6 (a long example); Chalcedon 9; Timothy 4; II Nicaea 18, 22; Protodeutera 16.

Sunday" means: from Vespers on Saturday night to Vespers on Sunday night. Canon 93, on the reception of heretics, is a word for word reproduction of Constantinople 7 save that one more category of heretic is now added. II Nicaea 6, on synods, slightly extends the provisions of earlier canons by adding punishments for governors who hinder yearly synods and for metropolitans who fail to call them. Protodeutera 8 extends Apostolic 22-24, on castration, to include those who order others to be castrated.

9) [from p. 171] Gennadius is an extended example of trying to close a loophole, directed at the "sophistic"[44] attempt by certain Galatian bishops to wriggle out of the Chalcedonian condemnation of simony, apparently by making distinctions regarding the time of the giving of the money. Gennadius – in rather technical-legal fashion – is quick to plug this loophole with a fine example of legal tense-comprehensivity: ἀλλ' οὐδὲ **πρὸ** τοῦ καιροῦ τῆς χειροτονίας, οὐδὲ **μετὰ** τὸν καιρὸν τῆς χειροτονοίας... οὐδὲ **παρὰ** τὸν καιρὸν... He then formally renews Chalcedon 2 in a highly categorical way: ἔδοξε καὶ ἡμῖν αὐτὰ ταῦτα πάλιν ἀνανεώσασθαι...ὥστε δίχα **πάσης** ἐπινοίας καὶ **πάσης** προφάσεως καὶ **παντὸς** σοφισμοῦ τὴν...συνήθειαν...ἐκτεμεῖν. Later he is also very careful to re-enumerate in a comprehensive way all of the possible subjects of this ruling (bishops, chorepiscopoi, periodeutai, etc.).

A different type of sophistication is evident in Athanasius 3, the letter to Rufinianus. Here sophisticated rule logic is not so much in evidence as a methodical clarification of a fairly technical rule on a specific subject (the reception of lesser clergy who had submitted to Arian leaders). Despite many rhetorical flourishes, Athanasius' answer moves very carefully through 1) the source of the ruling; 2) the reasons for the ruling and the nature of this formal exception, and 3) the criteria established by the ruling for its application.

Other texts are notably "jurisprudential" simply because of their sophisticated or sustained conceptual reasoning. Some instances are quite brief. Apostolic 76, for example, explains that bishops may not appoint successors because the things of God may not become subject to inheritance. This is far from a sophisticated jurisprudential rationale, but the presentation of the regulation as following directly from a general (divine) inheritance principle is striking. Ephesus 1 similarly notes that apostate

[44] The literal-technical reading being addressed is repeatedly characterized by the σοφισ- root (e.g. δεῖ...μὴ σοφίζεσθαι τὰ ἀσόφιστα;...οὐδὲ σοφιστικῆς δεόμενον ἐξηγήσεως).

metropolitans are not able to do anything against their bishops or participate in communion at all, "for already they have been cast out by the synod and are incapable of action" (ἤδη γὰρ ὑπὸ τῆς συνόδου ἐκβεβλημένος ἐστὶ καὶ ἀνενέργητος ὑπάρχει). On the face of it this is perhaps little more than remarking the simple consequence of an earlier action, but it nevertheless suggests that expulsion entails a formal doctrinal-conceptual consequence, namely a state of "anenergia". One can thus perhaps detect a kind of doctrinal-conceptual architecture (and a proprietary one at that) underlying this canon: expulsion entails anenergia, and anenergia entails that metropolitans in such a state cannot do anything legitimately against their bishops.

Some canons are notable for the jurisprudential method presumed. Trullo 40, for example, on the age of monastic profession, engages in some explicit analogical argumentation: the church earlier lowered the age of admission to the female diaconate to forty, and so Trullo may now lower the age of monastic profession.[45] A more minor form of such arguing may be found when secular regulations are presented as positing a lesser example for the church to follow "all the more" because of its spiritual nature (the *a minori ad maius* trope).[46]

A final example of a more lengthy and sustained foray into jurisprudential rule thinking – too long to convey at length – is Constantinople 394. This is a record of a formal discussion, full of technical terminology and stylizations, on a fairly technical matter: how many bishops are required (a minimum requirement, another rather "legal" concern) to depose another bishop. The answer is arrived at through a careful weighing and discussing of various legal principles and traditions, and the decision even presented partially in terms of what is logical ("ἀκόλουθον... ἀκόλουθος...).

10) [from p. 178, n. 180] Explicit non-canonical or non-scriptural authority references are made in three Trullan canons: in canon 16 John Chrysostom's *Homily* 14 on Acts (*PG* 60.116) is invoked to re-interpret Neocaesarea 15; in canon 32 the appeal by Armenian apologists to the same father's Homily 82 on Mathew (*PG* 58.740) is rejected; in canon 64 Gregory Nazianzen's *Oration* 32 (*PG* 36.188) is cited in support of the rejection of lay teachers. Canon 32 also counters the Armenian reading of John Chrsysostom by referring to elements from his liturgy, as well as from the liturgies of St James and St Basil. II Nicaea 2 cites Dionysius the Areopagite (*Ecclesiastical*

[45] Similar examples of analogical rule-creation or modification may be found in Basil 9, 18, or Gregory Nyss. 8.
[46] Chalcedon 18; Trullo 7.

Hierarchy 1.4; *PG* 3.389); 16 cites Basil's *Greater Asketikon* (*Regulae brev. tract.* 39; *PG* 31.977); canon 19 makes another citation of Basil's non-canonical writings, this time his treatise *On Fasting* (4; *PG* 31.192); and canon 20 contains a vaguer reference to Basil's monastic regulations. In Protodeutera 10 Gregory Nazianzen is cited loosely (cf. *Oration* 28; *PG* 36.45), almost in passing. Earlier use of non-canonical material to support rulings may be found in Cyprian and Timothy 9 (both liturgical references). (All references from *Fonti*.)

11) [from p. 179] Even in the first-wave quite specific, sometimes intra-corporal references,[47] are easily found. Nicaea 5 introduces its topic (Περὶ τῶν...) very clearly with the citing and affirmation of ἡ γνώμη κατὰ τὸν κανόνα τὸν διαγορεύοντα; Antioch 1 refers to the Nicene ὅρος on Easter, and then elsewhere to τοὺς θεσμοὺς τοὺς ἐκκλησιαστικούς (canon 3), τὸν ἀρχαῖον ἐκ τῶν πατέρων ἡμῶν κρατήσαντα κανόνα (canon 9, perhaps the more general usage of "canon"), τὸν ἤδη πρότερον περὶ τούτου ἐξενεχθέντα ὅρον (canon 21), and τὸν θεσμὸν τὸν ἐκκλησιαστικόν (canon 23); Constantinople 2, on the privileges of Alexandria, Antioch and the Asian civil dioceses, is quick to assert its coherence with "the canons" – three times, in fact, twice with explicit mention of Nicaea; Constantinople 394 refers specifically to the Apostolic canons; Chalcedon 19, on holding synods twice a year, legislates κατὰ τοὺς τῶν ἁγίων πατέρων κανόνας, clearly intending Nicaea 5 or Antioch 20; Theophilus in his letter to Agathos, charges a certain Maximus with "not knowing the laws of the church", ἀγνοῶν τοὺς τῆς ἐκκλησίας νόμους; Basil 3 takes as a central point of discussion an ἀρχαῖος κανών, as does canon 4 (...ὥρισαν κανόνα..., here as a tariff) which goes on to discuss its matter in terms of a συνήθεια which Basil has "received" (κατελάβομεν); the Apiarian documents in Carthage are aimed at discerning the real rules of Nicaea; and so on. "Renewal" canons are also not unknown.[48]

In the second-wave material all of these type of references become more frequent, and occasionally canons are even cited by number,[49] or, more often, quoted in part or even in full (sometimes explicitly "renewed").[50] This full citation of material is

[47] Explicitly, for example, in Constantinople 1, 2; Constantinople 394; Antioch 1; Chalcedon 28; Basil 88, Theophilus 12; Gennadius; Carthage 18c.
[48] For example, Chalcedon 2 and Gennadius.
[49] II Nicaea 16 refers to Chalcedon 2; Tarasios refers to Apostolic 29, Trullo 22, and Chalcedon 2; Protodeutera 8 to Nicaea 1, canon 9 to Antioch 5. Earlier, Carthage will sometimes refer to previous synods by name, e.g. canons 34, 48, 86, 94.
[50] Trullo 3, 6, 11, 12, 14, 25, 26, 34, 36, 38, 49, 84, 87, 94; II Nicaea 3, 5, 6, 7, 12; Protodeutera 8-12.

even evident (or at least likely) in many first-wave sources.[51] It represents a kind of ultimate traditionalization: new rules are physically built out of the old. The apogee of this type of rule-repeating is Tarasios, a long canonical florilegium on simony.

12) [from p. 180] Another excellent example is the very earliest source in the corpus, Cyprian. This "canon" frames its entire argument in traditional terms, beginning with a robust assertion of traditional authority: "We are persuaded regarding these things [the practices of re-baptizing heretics and schismatics] that you yourselves in doing these things have maintained the firmness of the canon of the Catholic Church" [τὴν στερρότητα τοῦ τῆς καθολικῆς ἐκκλησίας κανόνος κρατεῖν]. We then learn, a few lines later, that the central point of the letter is precisely to assure its readers that also Cyprian's opinion is not recent, but approved by his predecessors: "we present an opinion neither hasty nor established today, but that which has been long approved by our predecessors with much exactitude and care." The rest of the letter is then a didactic argument for Cyprian's position with suitably extensive citations from traditional sources, especially Scripture.

Ephesus 8, the elaborate ψῆφος on Cyprus, is also a traditional *tour de force*. It thus begins its condemnation of Antioch's actions by noting directly that a πράγμα καινοτομούμενον has emerged "against the customs and canons of the holy fathers". Later the lack of an ἔθος ἀρχαῖον for Antioch's actions is noted disapprovingly while the actions of the Cypriote bishops are, on the contrary, "according to the canons of the holy fathers and ancient usage". In the future, the decision continues, no bishop is to arrogate authority over a diocese that was not his "from the beginning". If he does, he is to give it back "so that the canons of the fathers are not transgressed". The final disposition concludes that every province is to retain the rights that pertained to according to the "custom prevailing from of old" (τὸ πάλαι κρατῆσαν ἔθος).

13) [from p. 185] Serdica 1 concludes with a scathing assessment of the moral character and motivations of its subjects: "Whence it has come to pass that such persons burn with a flaming greed and are slaves to pretension so that they might appear to acquire greater authority". Similar is canon 20, which contrasts at length characteristics of canonicity

[51] It is perhaps most likely in some of the canons of Basil and Gregory of Nyssa which often read as simply conveying older rules, including those rules of Basil that begin with (or are) a simple rule statement, almost as if Basil he is conveying an established tradition (e.g. 2, 3, 5, 8, 25, perhaps most of Basil 51-84). The best first-wave examples are, however, the literal doublets shared between the Apostles and Antioch (*Sources* Apostles). Gennadius also contains explicit citations of earlier material.

(σωτηριωδῶς, ἀκολούθως, πρεπόντως, θεῷ ἀρέσαντα καὶ ἀνθρώποις) with the uncanonical (ἀναισχυντία, τύφῳ μᾶλλον καὶ ἀλαζονείᾳ ἢ τῷ θεῷ ἀρέσαι). In Antioch 1 the strategy is to "pile" on harmful consequences of wrongdoing: "not only...but also...": ὡς **οὐ μόνον** ἑαυτῷ ἁμαρτίας **ἀλλὰ** πολλοῖς διαφθορᾶς καὶ διαστροφῆς αἴτιον γινόμενον, καὶ **οὐ μόνον** τοὺς τοιούτους καθαιρεῖ τῆς λειτουργίας ἀλλὰ καὶ τοὺς τούτοις κοινωνεῖν τολμῶντας. More briefly and typically Trullo 7 characterizes deacons who sit above their position as αὐθαδείᾳ καὶ αὐτονομίᾳ κεχρημένους and as τολμήσει τυραννικῷ [χρηωμένους] θράσει. In II Nicaea 8 Jews who feign Christian conversion do not just feign conversion but in so doing "mock" Christ (μυκτηρίζειν). In II Nicaea 9, the iconoclast writings are "childish playthings and maniacal ravings" – they are really pitiful, it seems!

14) [from p. 189, n. 202] Ed. and commentary, Burgmann and Troianos 1979; also Pieler 1997,90; Schminck 2005; Troianos 1987. It arranges excerpts from the Pentateuch under fifty topical titles (e.g. "On judgment and justice", "On theft", "On adulterers"). Although present in some canonical manuscripts as an appendix (see *Sbornik* 170) this collection seems to have originally had relatively little currency in the canonical tradition (more in the secular tradition, curiously).

In the manuscripts, however, other small testimonia-type appendix articles may also be occasionally found in which Scriptural passages are gathered to illuminate some topic, such as clerical oaths. One such collection is described for Paris supp gr. 843 in *Sin* 144; cf. also *RP* 4.415. The full extent of such excerpt collections is not known; it does not seem great.

15) [from p. 191] In Serdica 1, cited above, a short analysis is offered of the psychology of bishops who transfer sees: the real motivation for the bishops is a burning lust for power, which leads them to be "enslaved" to the passion of covetousness. A similar analysis is evident in Trullo 45: the new nun has her monastic life, formerly bolstered by "untroubled thoughts", λογισμοῖς ἀκλινέσιν, disturbed by a "remembrance", ἀνάμνησιν, of the world she left. As a result, her soul is troubled (ἐκταραχθῆναι) "as by waves churning and tossing this way and that". Tears are expected, and then analyzed in some detail for their effect on observers. Trullo 100 also engages in a short exposition on how easily bodily sensations (αἰσθήσεις) corrupt the

mind: "for the sensations of the body easily influence the soul" (ῥαδίως γὰρ τὰ ἑαυτῶν ἐπὶ τὴν ψυχὴν αἱ τοῦ σώματος αἰσθήσεις εἰσκρίνουσι).

Related are references to the heart, grief and tears, which feature surprisingly strongly in some canons, and emerge as some of the most dramatic internal and emotional colouring in the corpus. Tears, in particular, play a prominent role in the canons. Most frequently they arise as a substantive gauge of true repentance in lapsi canons, penitential material, and penal-attenuation clauses/canons.[52] Similarly, certain states of the "heart", as in Trullo 45, are also noted in the context of describing appropriate states of penance or sincerity.[53] The pathos of grief and inner pain also occurs, as in Apostolic 52 (Christ is "grieved).[54]

16) [from p. 191] A good example is Apostolic 51. Clergy who abstain from marriage, meat and wine not because of asceticism but βδελυρία, "abhorrence", have "forgotten" correct Scriptural doctrine: "forgetting that everything is 'very good' and that God made man male and female." Likewise Laodicea, normally very laconic, does not hesitate to tack on a few very short theological epexegetical comments, such as in canon 34, where heretic martyrs are to be avoided, "for these are not of God". In canon 48 the metaphysical effect of chrismation is briefly mentioned: "because it is necessary that those enlightened are chrismated after baptism with the heavenly chrism and become partakers of the kingdom of God." In Chalcedon 4 wandering monastics are to be confined "so that the name of God is not blasphemed". Trullo 4 dramatically glosses the violation of a consecrated woman as "having corrupted the bride of Christ". Trullo 90 provides some brief liturgical commentary, explaining standing on Sunday to begin on Saturday evening "as in this way we celebrate all day and night the resurrection." II Nicaea 13, after noting that iconoclasm was caused "according to our sins", concludes with a lengthy and dramatic Scriptural exploration of the nature of the excommunication of those who have turned religious houses into taverns: "[they are excommunicated] as condemned by the Father and the Son and the Holy Spirit and assigned to where 'the worm does not die and the fire is not quenched' [Isa. 66:24/Mark 9:44], because they have opposed the voice of the Lord saying 'Do not make my Father's house a house of trade' [John 2:16]."

[52] E.g. Ancyra 5; Basil 27, 77; Nicaea 12; Ephesus 9.
[53] Also II Nicaea 8, Trullo 41, 89, Basil 10, 75.
[54] Also Cyril 1, 2; Basil 90; Ephesus 9.

17) [from p. 193] In Laodicea 53, for example, Christians are to observe a "solemn", respectable manner, "as fitting to Christians" when present at weddings. Similarly, Carthage 132 is centered on instructing bishops *not* to understand certain behaviour – the denial of a previous private confession of sin – as ἴδια ὕβρις, personal insult (Apparently the ubristic aspect of such behaviour is sufficiently important as to require its own regulation!) At one point in the Appiarian acts the Africans are also keen to act "without any *hubris"*, χωρίς τινος ὕβρεως, in their dealings with the pope. Trullo 73, cited above, is directed towards guarding the honour, τιμή of the cross. We are not to "insult" it (ὡς ἂν μὴ... ἐφυβρίζοιτο) by placing it on the floor and walking over it. II Nicaea 16, on clerical clothing, is quite predictably concerned with the respectable appearances: clerics are to wear clothing that is suitably σεμνός, "solemn".

A concern for reputation also appears in the legislation with some regularity. Thus Gregory Thaum. 1 instructs that a judgment on the suitable penance for a violated woman is to be made on the basis of her former reputation, i.e. whether or not a "disposition to *porneia*" (πορνικὴ ἕξις) was "suspected" (ὕποπτος), or if she was "clean of all suspicion" (καθαρός ἔξω πάσης ὑπονοίας). Similarly, the treatment of lapsi priests in Ancyra 3 is moderated "if their previous way of life was found to be proper". Carthage 38 can casually note "certain honorable Christians" (ἔντιμοί τινες χριστιανοί) as among those who can chaperone visits with virgins and widows. Even the church as a whole has a reputation which must be guarded – so Cyril 4, cited above, and Carthage 44: virgins are to be commended into the care of older women "lest wandering all over they harm the reputation of the church" (ἵνα μὴ πανταχοῦ πλανόμεναι τὴν ὑπόληψιν βλάψωσιν τῆς ἐκκλησίας). Nicaea 9 makes something of a principle of this: "the Catholic church requires that which is blameless" (τὸ γὰρ ἀνεπίληπτον ἐκδικεῖ ἡ καθολικὴ ἐκκλησία).

Procedural legislation, in particular, is quite concerned with matters of reputation and status. Thus Apostolic 74 direct that plaintiffs must be trustworthy (ἀξιοπίστοι); Constantinople 6 is quite concerned about reputations (ὑπολήψεις) and testing "persons" (δοκιμάζεσθαι χρὴ...τὰ πρόσωπα); Chalcedon 21 commands an inquiry into the ὑπόλυψις of plaintiffs; and Carthage 9 disallows accusations from the "many" who are "not of good way of life" (οὐκ ἀγαθῆς ἀναστροφῆς).

18) [from p. 194] Carthage 60 is something of a set-piece of shame-honour texturing. Heathen feasts must be eradicated during martyr festivals, as "...in these days, and it is

shameful to even say it, abominable dances are performed in fields and open spaces, with the result that the honour of house-mistresses and the modesty of innumerable other women who have gathered for the holy day are assaulted, so that the approach to the faith itself is fled from." Many honour/shame motifs and topoi are combined here: public wrongdoing, dancing, women being assaulted, shameful insults – and all in the pronounced language of τιμή, αἰσχύνη, and ὕβρις.

In Serdica 6 "name" and "face" become an issue: bishops are not be appointed to small villages lest the "name" and "authority" of the episcopate be belittled (ἵνα μὴ κατευτελίζηται τὸ τοῦ ἐπισκόπου ὄνομα καὶ ἡ αὐθεντία). Similarly, in canon 11 bishops are not to spend time in other dioceses lest, among other things, they happen to "shame and belittle the person of the bishop there" (καταισχύνειν καὶ κατευτελίζειν τὸ προσώπον τοῦ αὐτόθι ἐπισκόπου).

"Scandal" emerges in Trullo 12, which explains the problem of married bishops precisely in that they are "a stumbling block [πρόσκομμα] to the people there and a scandal [σκάνδαλον]" (see Rom. 14:13). This same scriptural image will reoccur in Trullo 47, II Nicaea 18 and 20 in similar "shame" situations. Preserving honour also emerges as a central concern in Trullo 37, both with the phrase "we, guarding the honour and reverence [τίμιον καὶ σεβάσμιον] of the priesthood", and by casting the particularly problem at issue, barbarian invasions, as ἐπήρεια, "abuse", which has clear connotations of insult and affront. Protodeutera 12 is also quick to point out the scandalous and improper nature of illicit house liturgies: these are contrary to the church's "dignity of life" (τὸ σεμνὸν τῆς πολιτείας), and full of "much tumult and scandals" (πολλῆς ταραχῆς καὶ σκανδάλων).

19) [from p. 201] Basil 84, a reflection on what to do with impenitent sinners, is a good example of church order explicitly transacted against the backdrop of the final judgment. Basil states that these people do not realize that the recent "wrath of God" has come upon the community as a means of scourging them their sins (μηδὲ συνῆκαν ὅτι διὰ ταῦτα ἦλθεν ἐφ᾽ ἡμᾶς ἡ ὀργὴ τοῦ Θεοῦ.) In the end, one must separate from such persons so as not to be destroyed with them (μὴ τοίνυν καταδεξώμεθα συναπόλλυσθαι τοῖς τοιούτοις), for one must always keep in mind "the deep judgment and the fearful day of the Lord's retribution" (τὸ βαρὺ κρίμα καὶ τὴν φοβερὰν ἡμέραν τῆς ἀνταποδόσεως τοῦ Κυρίου). One must try to save such persons (through the penitential system), but if this is not possible, "let us hasten to save at least our own

souls from eternal condemnation" (σπουδάσωμεν τὰς γοῦν ἑαυτῶν ψυχὰς τῆς αἰωνίου κατακρίσεως περισώσασθαι).

Earlier, in canon 10, a similar eschatological-forensic context emerges quite strongly when the divine once more gets a decision referred to it. Basil notes his frustration and uncertainty at a case involving a certain Severus, but grants him forgiveness on the basis of what he has heard, noting however that "since we are not judges of hearts, but we judge from what we hear, we will give vengeance/judgment to the Lord" (ἐπειδὴ δὲ οὐκ ἐσμὲν καρδιῶν κριταί, ἀλλ᾽ ἐξ ὧν ἀκούομεν κρίνομεν, δῶμεν τῷ Κυρίῳ τὴν ἐκδίκησιν). Basil not only slightly hedges his own judgment, but reminds us that canonical process is ultimately taking place against the background of the final judgment.

The final divine tribunal is also invoked in Cyril 2, but for a rather more prosaic purpose. Cyril rejects the idea that bishops should have to give detailed accountings of all their expenses, for they will have to give a final accounting to the "judge of all": ἕκαστος γὰρ ἡμῶν τῶν ἰδίων καιρῶν δώσει λόγον τῷ πάντων κριτῇ.

In II Nicaea 13, on turning sacred properties into public inns, divine juridical glossing emerges once again. The relevant phrase, one of the longest and most forceful of such glosses in the corpus, reads: "[they are excommunicated] as condemned by the Father and the Son and the Holy Spirit and assigned to where 'the worm does not die and the fire is not quenched' [Isa. 66:24/Mark 9:44], because they have opposed the voice of the Lord saying 'Do not make my Father's house a house of trade' [John 2:16]". The eschatological reality of such canonical wrong-doing cannot be made more clear: it entails excommunication by the Trinity itself and a condemnation from Jesus' own mouth – completed with a picturesque Scriptural description of the results!

APPENDIX D
Appendix to Chapter 4

(The following are supplementary notes, supplying further details, texts and examples for various points in the main text. These notes are referred to in the main text and/or footnotes by appendix and note number.)

1) [from p. 206, n. 1] Only in the 12th C or 13th C does one other small handbook-like thematic collection emerge, the Synopsis of Arsenios, in 141 titles, apparently very local, and known only from one manuscript (Paris 1371, ed. Voellus and Justel 1661,2.749-784 = *PG* 133.9-26; see Menebisoglou 1984,89-90; *Peges* 249, 301-302). In the 14th C two other thematic collections are produced, Blastares' Σύνταγμα κατὰ στοιχεῖον" (*RP* 6), and Harmenopoulos' Ἐπιτομὴ κανόνων (ed. Leunclavius 1591,1.1-71 = *PG* 150.45-168) . Both see considerable circulation, particularly the former, which becomes extremely popular in the post-Byzantine east (Pavlov 1902,75-76; *Peges* 297-301; 302-303). Even Blastares, however, never entirely supplants the earlier, and by then very ancient and traditional, thematic systems, particularly the *Coll14*, associated, of course, with the name of Photius since the 12th C. (Details of the *Nachleben* of the *Coll14* and *Coll50* in the 15-18th C are not, however, well known.)

2) [from p. 217, n. 46] For example, the *Coll14* with a systematic corpus is found in Paris Cois. 36 or Vatican gr. 1142 (see *Sbornik* 307-313 on the last). Similarly, the *Coll50* index can likewise be found without its systematic corpus, accompanying a straight corpus collection, for example in Rome Barb. 578 (see *Sin* 223 for other examples). Note that in Cresconius the thematic index can also apparently become detached and added to other collections (Zechiel-Eckes 1992,1.205-225, 261-267; cf. Maassen 1871,817-818 on the systematic Hispana).

3) [from p. 226, n. 65] Cresconius is formed mostly from a pre-existing set of rubrical index titles (from Dionysius II; see Zechiel-Eckes 1992,1.55; on Dionysius' index, see Firey 2008), and something similar may have been true of the Byzantine collections as well. However, preliminary examination has not revealed any clear or convincing relation of the extant Byzantine synopsis rubrics (or those preserved in Vienna hist. gr. 7, *Syn* 193-223) to the rubrics of the *Coll50* or *Coll14*. Further investigation with rubrics preserved in Latin and Syrian manuscripts would be worthwhile. (I have also found no convincing way of extracting 60 formally similar rubric fragments from the

rubrics of the *Coll50* – i.e. to demonstrate that the *Coll50* may have been constructed from the old *Coll60* rubrics.)

4) [from p. 240, n. 84; also from p. 84, n. 9] Roman Law This list includes both heavily reconstructed early materials as potential influences, direct or indirect – or at least illustrative of the possibilities of legal ordering – as well as better preserved later texts.

- Twelve Tables (as per Crawford 1996,555-721 and, alternatively, Riccobono 1941,21-75, the latter with trans. Johnson et al. 1961,9-18)
- Q. Mucius Scaevola's *Ius civilis* and the related Sabinian order (as per Lenel 1889,2.1257-1261, 1892, with analysis at 90-104; also, for the former, Liebs 1976,223 and Watson 1974,142-144, and generally Schulz 1953,94-95, 157-158. The Sabinian order may be considered one of two fundamental "backbone" structures in Roman legal literature.)
- Praetorian Edict (the other fundamental structure; as per Lenel 1889,2.1247-1256; with reference to Schulz 1953,148-152)
- the *digesta* orders (more or less the Edict order plus a selection of appended *leges*, as per Lenel 2.1257-1261, and with reference to Schulz 1953 *passim*.)
- *CTh* (mostly a modified *digesta* order; see especially Harries 1998, Matthews 2000)
- *CJ* (similar to *CTh/digesta*)
- *Digest* (a kind of *digesta* order; see in particular Honoré 1978,139-186.) Also considered is the order of the *Digest* described in *Tanta*/Δέδωκεν, and the orders of the educational curricula in *Omnem.*
- *Institutes*: Florentinus' (as per Schulz 1953,158-159); Marcian's (as per Schulz 1953,172-173); Gaius' (ed. Seckel and Kuebler 1935); Justinian's. Related to Mucian/Sabinian order.

Most of the standard source surveys consider briefly the order of many of the above structures; Schulz 1953 is particularly helpful throughout. The table of Mommsen in *CTh* vol. 1 (Prolegomena) xiii-xxvii is invaluable for considering the Edictal order in relationship to the *CTh* and *CJ*. Soubie 1960 is also helpful for the order and structure of the *Digest*.

Byzantine Law:

- Athanasius of Emesa: *Syntagma* (ed. Simon and Troianos 1989) and *Epitome* (ed. Simon and Troianos 1979) (both novel collections)
- *Ecloga* (discussion of order Burgmann 1983,7-8)
- *Nomos Mosaikos* (ed. Burgmann and Troianos 1979)
- *Eisagoge*
- *Prochiron*
- *Basilica* (order still mostly based on Edict, see Lawson 1930,494-500)

Late Roman/Byzantine Ecclesiastical Law:
The order of topics in *CTh* 16; *CJ* 1.1-13; *NN.* 5, 6, 7, 123, 131; *Coll87*; and the *Tripartita.*

Philosophical or literary legal discussions:

- Plato *Laws* (ed. Burnet 1907 with reference the commentary of Schöpsdau 1993, 2003, esp. the schematic 1993,95-98)
- Cicero *Laws* (ed. Powell 2006 with reference to the commentary of Dyck 2004)
- Plutarch's description of Solon and Lycurgus' legal activity in their *vitae* (ed. Lindskog and Ziegler 1957-1980)
- Josephus *Antiquities* 4.197-292 (ed. Niese 1887-1892) and *Against Apion* 2.164-219 (ed. Niese 1889,3-99). Both are re-organized presentations of the Mosaic law; see Atlschuler 1982/1983 and Geza 1982.
- Philo *On the Special Laws* (ed. Cohn 1906,1-265; essentially the Pentateuchal laws re-organized under the headings of the Ten Commandments)
- Dionysius of Halicarnassus *Roman Antiquities* 2.1-29 (ed. Jacoby 1885; here a description of Romulus' constitution and laws)

Scripture

- Exodus (particularly chs. 20-40, with 20-23, 25-31, 35-40 as regulative discourses interspersed with narrative; includes 20.22-23.33 the "Covenant Code" of modern scholarship)
- Ten Commandments: Exodus 20:1-17; Deut. 5:6-21
- Leviticus (as a whole, and as an extension of Exodus; the modern delimitation of 17-26 as the "holiness code" does not seem especially obvious or relevant for our purposes)
- Deuteronomy as a whole (particularly 12-26, perhaps with 4-11 as a lengthy introductory section; see esp. Tigay 1996,449-459, with schematic)
- the Pentateuch as a whole
- Matthew 5-7 (Sermon on the Mount)
- Epistles with substantial structured regulative sections (including the "Household codes" of modern scholarship): 1 Corinthians; Colossians; Ephesians; Titus; 1 Timothy; 1 Peter.

Apostolic Church Orders:

- *Didache* (ed. Niederwimmer 1993)
- *Apostolic Tradition* (ed. Bradshaw 2002; see at 15 for variant orderings) as well as its later forms, the *Testament of the Lord* (ed. Rahmani 1899), and the *Canons of Hippolytus* (ed. Bradsahw and Bebawi 1987)
- *Constitutiones ecclesiasticae apostolorum* or "Apostolic Church Ordinances" (ed. Arendzen 1901)
- *Didascalia* (ed. Funk 1905)
- *Apostolic Constitutions* (ed. Metzger 1985)

Steimer 1992 provides the best overview of the Apostolic Church Order literature, with many further references to different versions and editions.

5) [from p. 243, n. 94] Their fortunes in the editions have varied. They are completely absent in Beveridge, and also (thus?) *RP* and the *Pedalion*; Pitra notes the presence of the first two in some MSS (*Pitra* 2.23, n.1; 2.45, n.1), but not the last, and does not include any in his main text; Beneshevich includes the first two in *Kormchaya*, without comment, but not the last; *Fonti* (and thus Nedungatt and Featherstone 1995) includes

them all without any textual notes at all, aside from asserting in his introduction that "the manuscripts divide the texts into three sections" (*Fonti* 1.98). Ohme 2006,46 and Troianos 1992,10 mention them but don't indicate that they are part of the manuscript tradition.

Confusion seems to have been created by Laurent 1965, an influential article that speaks (20, n. 54) as if the rubrics were the invention of Pitra, a view that seems to find echo in Gavardinas 1998,58-59, *Historike* 290 and Troianos 1992,10.

In my own examination of manuscripts, the first two rubrics are usually present, albeit sometimes in the margins, but not the third. However, I was able to find the third in at least three manuscripts, Moscow Syn. 398, Patmos 205, and Vat. gr. 1980, the first and last of which are quite old (10th-11th C). Even here, of course, the rubrics may still represent later additions.

A full resolution of the problem of the rubrics' originality will have to await Ohme's edition for the *ACO*, in preparation. One reason for suspecting that they are original, however, is that they are strikingly accurate – especially by Byzantine standards. Canons 3-39 are all almost exclusively, and always primarily, addressed to the clergy; canons 40-49 form a very tight group of strictly monastic legislation; and the final section, 50-102, while more varied in subject, contain no canon that only addresses the clergy or monastics or both – they either lack a specific addressee, contain multiple addressees that include the laity, or are addressed exclusively to the laity. Moreover, the divisions created by the rubrics are numerically quite neat (including the overall century, which, by dividing off canon 1 and 2, the rubrics make much clearer), suggesting that this was a schema being "composed to".

6) [from p. 244, n. 95] This last pattern is broadly true of all the *CTh* and *CJC* material, which are headed by reasonably high status doctrinal, theoretical and high-office matters (i.e. *CTh* 1, *CJ* 1, *Digest* 1, *Institutes* 1.1-2) and where criminal material appear quite late (i.e. *CTh* 9, *CJ* 9, *Digest* 47-48 – the "libri terribiles" of *Tanta* 8a – and *Institutes* 4, covering delicts by wrongdoing generally, strictly criminal matters in 4:18). Within *CTh* and *CJ* the structures specifically dedicated to church matters (*CTh* 16, *CJ* 1.1-13) likewise place heretics, pagans, and other disagreeable subjects noticeably after faith and cultic matters. The same pattern may be found in all of the Byzantine collections as well, especially in the tendency of placing a large criminal-penal section last or near-last, as in *Ecloga* 17, *Nomos Mosaikos* 42-50, *Eisagoge* 40, *Prochiron* 39,

Basilica 60, Novels of Leo 58-66; and faith/theory/high officers earlier, as *Nomos Mosaikos* 1-2, *Eisagoge* 1-9, *Basilica* 1-7, Novels of Leo 1-17. This is also apparent in Plato's *Laws* (clearly starting with religious matters and high offices in 715e-768e and much later moving on to criminal material in 853d-910d), as well as Josephus *Antiquities* (4.199-213 vs. 4.266-291), and even the *Didascalia*, with its early books (1-2) on general teaching and the hierarchy and its last on "schism". Indeed, such a pattern is true of the Ten Commandments (1-5 on the identity of God and cultic matters, 6-10 on disciplinary and criminal matters) – and so thus also in Philo *Special Laws* 1-2 vs. 3-4. Cicero's *Laws* breaks off in book 3, but also begins with religious and cultic matters (2.8) before moving on to magistrates (3.1) – it thus at least started with high-status matters. The curious end-source "recovering" of more respectable topics is a much more tenuous phenomenon, but can perhaps be seen in *CTh* 16 (on religious matters), *CJ* with its last title on "dignities", and perhaps *Digest* 50.16-17 with its return to theoretical matters (general definitions and rules). The *Canons of Hippolytus* similarly conclude with Pascha.

7) [from p. 246, n. 98] It is particularly evident in almost all collections that begin with any type of theoretical and/or *Amtsweisungen* section, which lend the first part of the texts a fairly clear and logical structure rarely matched later in the collections. Thus most of the extant secular Roman material, including the ecclesiastical sections or collections, as well as the Apostolic church orders, could be counted here. Plato's *Laws* also contains a notably miscellaneous end section (broadly 932-958), and the Deuteronomic code loses much structure after 23:10 (until 25). The reconstructions of the Twelve Tables likewise suggest a pattern of increasing disorder (tables 11 and 12). The Roman *digesta* pattern, and all sources more or less dependant upon it, also evinces this tendency in another way, by beginning by following the Edict rather carefully, but then gradually descending into somewhat more miscellaneous public law matters. Noailles and Dain 1944,xix likewise notes such a pattern for the 113 Novels of Leo (ordered until 66, with distinct subject groupings, then becoming quite miscellaneous). More examples could be offered. In many cases, Harries 1998,78 is no doubt correct when she notes a similar pattern in the *CTh*, and attributes it to patterns of later modification: "...the ancient habit with law-codes was to set down what mattered most first, in an organized system, and then add modifications later, as required." This pattern of miscellanization, however, is too pronounced and widespread to attribute it

always to processes of later haphazard addition or modification. It is also, I think, a true compositional, or at least editorial, tendency: the beginning must be carefully structured, not the end.

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